ALBERTA LAW REFORM INSTITUTE

EDMONTON, ALBERTA

ALBERTA RULES OF COURT PROJECT

Non-Disclosure Order Application Procedures in Criminal Cases

- **Substantial and Procedural Law Background**
- **Current Procedures**
- **Uniform Rules for *In Camera* and Sealing Orders and Publication Bans**
- **Media Notification and Standing**
- **Notification of Orders**

Consultation Memorandum No. 12.15

November 2004

Deadline for Comments: January 15, 2005

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ALBERTA RULES OF COURT PROJECT

The Alberta Rules of Court Project is a 3-year project which has undertaken a major review of the *Alberta Rules of Court* with a view to producing recommendations for a new set of rules by 2004. The Project is funded by the Alberta Law Reform Institute (ALRI), the Alberta Department of Justice, the Law Society of Alberta and the Alberta Law Foundation, and is managed by ALRI.

This Consultation Memorandum is issued as part of the Project. It has been prepared with the assistance of the members of the Rules Project Criminal Rules Committee, who were generous in the donation of their time and expert knowledge to this project. The members of the committee are:

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A reader who wishes to have more information about the Alberta Rules of Court Project may consult the background material included in each of the Consultation Memoranda 12.1 to 12.9. More complete information, including reports about the Project and particulars of previous Consultation Memoranda, may also be found at, and downloaded from, the ALRI website: *http://www.law.ualberta.ca/alri.*

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THE RULES PROJECT CONSULTATION MEMORANDA

No.	Title	Date of Issue	Date for Comments
12.1	Commencement of Proceedings in Queen's Bench	October 2002	January 31, 2003
12.2	Document Discovery and Examination for Discovery	October 2002	January 31, 2003
12.3	Expert Evidence and "Independent" Medical Examinations	February 2003	May 16, 2003
12.4	Parties	February 2003	June 2, 2003
12.5	Management of Litigation	March 2003	June 30, 2003
12.6	Promoting Early Resolution of Disputes by Settlement	July 2003	November 14, 2003
12.7	Discovery and Evidence Issues: Commission Evidence, Admissions, Pierrringer Agreements and Innovative Procedures	July 2003	November 14, 2003
12.8	Pleadings	October 2003	January 31, 2004
12.9	Joining Claims and Parties, Including Third Party Claims, Counterclaims and Representative Actions	February 2004	April 30, 2004
12.10	Motions and Orders	July 2004	September 30, 2004
12.11	Enforcement of Judgements and Orders	August 2004	October 31, 2004
12.12	Summary Disposition of Actions	August 2004	October 31, 2004
12.13	Judicial Review	August 2004	October 31, 2004
12.14	Miscellaneous Issues	October 2004	November 30, 2004
12.15	Non-Disclosure Order Application Procedures in Criminal Cases	November 2004	January 15, 2004

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ALBERTA LAW REFORM INSTITUTE

The Alberta Law Reform Institute was established on January 1, 1968, by the Government of Alberta, the University of Alberta and the Law Society of Alberta for the purposes, among others, of conducting legal research and recommending reforms in the law. Funding of the Institute's operations is provided by the Government of Alberta, the University of Alberta, and the Alberta Law Foundation.

The members of the Institute's Board are A. de Villars, Q.C.; A.D. Fielding, Q.C.; The Hon. Judge N.A. Flatters; P.M. Hartman, Q.C.; W.H. Hurlburt, Q.C.; H.J.L. Irwin, Q.C.; P.J.M. Lown, Q.C. (Director); A.D. Macleod, Q.C.; The Hon. Madam Justice B.L. Rawlins; W.N. Renke; D.R. Stollery, Q.C.; The Hon. Mr. Justice N.C. Wittmann (Chairman) and K.D. Yamauchi.

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PREFACE AND INVITATION TO COMMENT

Comments on the issues raised in this Memorandum should reach the Institute by January 15, 2005 .

This consultation memorandum addresses application procedures for "non-disclosure orders" in the Court of Queen's Bench and the Court of Appeal – including publication ban orders, certain sealing orders, and *in camera* orders, made under discretionary common law or statutory authority. This consultation memorandum shall not address the following:

(a) Provincial Court rules, or issues that are the exclusive concern of the Provincial Court;

(b) non-disclosure issues arising under the *Youth Criminal Justice Act*;

(c) the law of contempt;

(d) issues under the *Freedom of Information and Protection of Privacy Act*;

(e) "administrative editing" (the non-judicial/administrative removal of information from judgments after judgments have been filed); or

(f) applications respecting the disclosure of information that could injure international relations, national defence, or national security made under s. 38 *et seq.* of the *Canada Evidence Act*, since these applications are heard only by the Federal Court.

Having considered case law, comments from the Bar and the Bench, and comparisons with the rules of other jurisdictions, the Criminal Rules Committee has identified a number of issues respecting application procedures for "non-disclosure orders" and has made preliminary proposals. These proposals are not final recommendations, but are put to the legal community for further comment. These proposals will be reviewed once comments on the issues raised in the consultation memorandum are received, and may be revised accordingly. While this consultation memorandum attempts to include a comprehensive list of issues in the areas covered, there may be other issues which have not been, but should be, addressed. Please feel free to provide comments regarding other issues which should be addressed.

We encourage your comments on the issues and the proposals contained herein. You may respond to one, a few or many of the issues addressed. You can reach us with your comments or with questions about this consultation memorandum or the Rules Project on our website, by fax, mail or e-mail to:

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EXECUTIVE SUMMARY

This summary highlights only some of the issues that the Committee discussed and proposals which it reached. The complete discussion of all issues and Committee proposals is contained in the consultation memorandum.

Chapter 1 describes the authority to make rules of court for criminal litigation, and the nature of federal involvement in establishing criminal rules of court.

Chapter 2 discusses the general substantive and procedural doctrine that must be accommodated by any rules of court respecting non-disclosure orders. The foundational authority is the Supreme Court's *Dagenais* case. Essentially, open courts and unhampered public access to litigation information are the rule. Any limitations must be justified – through a balancing process – as reasonable, minimal, and proportional. Procedurally, balancing requires an application on notice. The media, as representatives of the public, must receive notice and should be accorded appropriate standing in the hearing. *Dagenais*, however, does not provide an exhaustive procedural code.

Chapter 3 describes current legislation and common law non-disclosure mechanisms, which exist in the shadow of *Dagenais*. These mechanisms can be classified into three main groups – *in camera* orders, sealing orders, and publication bans. Publication bans include common law inherent jurisdiction bans, which are discretionary; and statutory bans. The statutory publication ban environment is complex. There are four subtypes – "*per se* mandatory publication bans," "mandatory on application bans," "presumptively mandatory bans," and "discretionary on application" bans. The *Dagenais* procedural standards should be applied to applications for *in camera* orders, sealing orders, inherent jurisdiction publication bans, and discretionary on application statutory publication bans.

Chapter 4 reviews current rules respecting non-disclosure order applications in Nova Scotia and Alberta. The 1997 Court of Queen's Bench Criminal Practice Note No. '4', the 2004 Provincial Court Practice Note respecting non-disclosure orders, and

the 2004 Court of Queen's Bench Civil Practice Note respecting non-disclosure orders are compared and contrasted.

Chapter 5 sets out the issues for Court of Queen's Bench Criminal Rules of Court reform in the area of non-disclosure orders.

Chapter 6 provides the Committee's proposals respecting rules for non-disclosure order applications before the Court of Appeal. The Committee's view is that rules should simply provide that the Court of Appeal shall follow the Court of Queen's Bench Rules, with any necessary modifications.

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CHAPTER 1. BACKGROUND TO THE MAKING OF RULES FOR CRIMINAL PROCEDURE

[1] The making of procedural rules for criminal cases is governed by (A) the *Criminal Code*[1] and (B) the *Statutory Instruments Act*.[2]

A. Rule-making and the *Criminal Code*

[2] The authority to make rules for criminal proceedings in the Court of Queen's Bench and the Court of Appeal is established by s. 482 of the *Criminal Code*, which provides as follows:[3]

> (1) Every superior court of criminal jurisdiction and every court of appeal may make rules of court not inconsistent with this or any other Act of Parliament, and any rules so made apply to any prosecution, proceeding, action or appeal, as the case may be, within the jurisdiction of that court, instituted in relation to any matter of a criminal nature or arising from or incidental to any such prosecution, proceeding, action or appeal.
>
> * * * *
>
> (3) Rules under subsection (1) . . . may be made
>
> (a) generally to regulate the duties of the officers of the court and any other matter considered expedient to attain the ends of justice and carry into effect the provisions of the law;
>
> (b) to regulate the sittings of the court or any division thereof, or of any judge of the court sitting in chambers, except in so far as they are regulated by law;
>
> (c) to regulate the pleading, practice and procedure in criminal matters, including pre-hearing conferences held under section 625.1, proceedings with respect to judicial interim release and preliminary inquiries and, in the case of rules under subsection (1), proceedings with respect to *mandamus, certiorari, habeas corpus*, prohibition and *procedendo* and proceedings on an appeal under section 830; and

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[1] R.S.C. 1985, c. C-46.

[2] R.S.C. 1985, c. S-22.

[3] The federal *Interpretation Act* applies to duly-constituted rules made under s. 482, since these rules fall under the definition of "enactment" (as a form of "regulation") under this Act: R.S.C. 1985, c. I-21, ss. 2, 3.

> (d) to carry out the provisions of this Act relating to appeals from conviction, acquittal or sentence and, without restricting the generality of this paragraph,
>
> (i) for furnishing necessary forms and instructions in relation to notices of appeal or applications for leave to appeal to officials or other persons requiring or demanding them,
>
> (ii) for ensuring the accuracy of notes taken at a trial and the verification of any copy or transcript,
>
> (iii) for keeping writings, exhibits or other things connected with the proceedings on the trial,
>
> (iv) for securing the safe custody of property during the period in which the operation of an order with respect to that property is suspended under subsection 689(1), and
>
> (v) for providing that the Attorney General and counsel who acted for the Attorney General at the trial be supplied with certified copies of writings, exhibits and things connected with the proceedings that are required for the purposes of their duties.
>
> (4) Rules of court that are made under the authority of this section shall be published in the *Canada Gazette*.
>
> (5) Notwithstanding anything in this section, the Governor in Council may make such provision as he considers proper to secure uniformity in the rules of court in criminal matters, and all uniform rules made under the authority of this subsection prevail and have effect as if enacted by this Act.[4]

[3] Section 482 gives Courts the power to make rules of court that "generally involve matters of pleading, practice and procedure in relation to proceedings in the court and are expressly meant to facilitate and regulate the carrying into effect of the provisions of the law."[5] The power to make rules pursuant to s. 482 is limited to matters already within the jurisdiction of the Court.[6] Section 482 cannot be used to make rules that grant substantive rights supplemental to those in the *Criminal Code*.[7]

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[4] To date, no uniform rules of criminal procedure have been established under s. 482(5).

[5] *R. v. H. (E.)* (1997), 33 O.R. (3d) 202, *(sub nom. R. v. Rhingo* (1997), 115 C.C.C. (3d) 89 at 98 (Ont. C.A.), leave to appeal to S.C.C. refused, [1997] S.C.C.A. No. 256, 274.

[6] *Ibid.* at 99.

[7] *R. v. B.C. Tel* (2002), 214 D.L.R. (4th) 729 at para. 55 (B.C.C.A.) [*B.C. Tel*].

[4] Under s. 482(1), the Court of Queen's Bench and the Court of Appeal are entitled to make criminal rules without the approval of the Governor in Council. Nonetheless, under s. 482(4), rules "shall be published in the *Canada Gazette*."

B. Federal Involvement in Rule-making

[5] The requirement of *Canada Gazette* publication entails a level of approval beyond the courts. Rules of court would fall under the definition of "regulation" and the Court of Queen's Bench and the Court of Appeal would fall under the definition of "regulation-making authority" in the *Statutory Instruments Act*.[8] Section 3 of the *Statutory Instruments Act* provides as follows:

> (1) ... where a regulation-making authority proposes to make a regulation, it shall cause to be forwarded to the Clerk of the Privy Council three copies of the proposed regulation in both official languages.
>
> (2) On receipt by the Clerk of the Privy Council of copies of a proposed regulation pursuant to subsection (1), the Clerk of the Privy Council, in consultation with the Deputy Minister of Justice, shall examine the proposed regulation to ensure that
>
> (a) it is authorized by the statute pursuant to which it is to be made;
>
> (b) it does not constitute an unusual or unexpected use of the authority pursuant to which it is to be made;
>
> (c) it does not trespass unduly on existing rights and freedoms and is not, in any case, inconsistent with the purposes and provisions of the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights*; and
>
> (d) the form and draftsmanship of the proposed regulation are in accordance with established standards....

[6] Once the vetting process is completed and a regulation is made, the regulation-making authority must transmit copies of the regulation in both official languages to the Clerk of the Privy Council for registration.[9] The Clerk of the Privy Council may refuse to register a regulation if it was not (in effect) approved under s. 3.[10] Generally,

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[8] *Supra* note 2, s. 2. No exemption is established for Rules of Court. See the *Statutory Instruments Regulations*, C.R.C., c. 1509, s. 7.

[9] *Statutory Instruments Act*, *ibid.*, s. 5(1).

[10] *Ibid.*, s. 7(1).

a regulation is published in the *Canada Gazette* within twenty-three days from registration.[11]

[7] The need for federal vetting arises only at the stage when rules are being drafted and worked into near-to-final form. At this stage, when only principles governing potential rules are at issue, there is no need for federal intervention or involvement. In any event, the criteria described in ss. 3(a) - (c) of the *Statutory Instruments Act* would be considered in any determination of appropriate principles for the drafting of rules of court and have been considered by the Committee.

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[11] *Ibid.*, s. 11(1).

CHAPTER 2. THE LEGAL CONTEXT FOR NON-DISCLOSURE ORDERS

[8] Many modern legal battles have been fought and are being fought over access to information. Courtrooms are one of the battlefields. Contending over litigation information are forces urging public disclosure and openness, and forces urging restrictions on disclosure and limitations on access.

[9] Publication bans and other non-disclosure orders may be understood to fall along a continuum of information-restricting legal techniques. The rules of competence and compellability (e.g. respecting spouses or jurors), admissibility (e.g. respecting hearsay), and privilege (e.g. respecting investigators or investigative techniques) may all be used to restrict access to information, by keeping information from being admitted into evidence before the trier of fact. Publication bans and non-disclosure orders have a sort of "half-way house" role: evidence has been admitted, thereby bringing information before the trier of fact, but these orders restrict the public dissemination of the information.

[10] The job of procedural reform respecting publication bans and other non-disclosure orders is to develop rules to mediate the skirmishes over openness and restrictions on openness.

[11] This Chapter shall provide the context for a discussion of recent procedural developments and outstanding procedural issues through an account of (A) the substantive principles that must be procedurally accommodated and (B) the procedural implications of the requirement of balancing.

A. Openness, Limitations on Openness, and Balancing

[12] In criminal cases, disputes over the openness of courts and access to litigation information must be resolved within the framework established under the *Canadian Charter of Rights and Freedoms*.[12]

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[12] The *Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, enacted by the *Canada Act 1982* (U.K.), c. 11 [*Charter*].

[13] The *Charter* jurisprudence recognizes that good reasons may sometimes support openness or access, and sometimes support restrictions. Under the Charter, neither set of reasons necessarily or always trumps the other. In particular cases, the interests at stake must be "balanced."

1. Openness

[14] A fundamental principle of our justice system is that criminal proceedings should be public: "covertness is the exception and openness the rule."[13] Court rooms should be open to the public. Parties and witnesses should be named. The public should have reasonable access to court records and trial exhibits. The news media should be entitled to report litigation matters. This principle has constitutional support.

[15] Paragraph 2(b) of the *Charter* protects freedom of expression, including freedom of the press.[14] Freedom of expression and freedom of the press demand access to litigation information. The openness of litigation ensures that the public is aware of the actions of justice system participants, including police officers, prosecutors, witnesses, defence counsel, and judges. Openness helps ensure accountability.[15] Openness also permits the public to be informed about litigated issues and the results of particular prosecutions. Criminal law issues are very much issues of public concern; the principles at work in criminal cases often expose or illuminate the basic standards of our civil society. Criminal cases have a public educational function. The public has

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[13] *Nova Scotia (Attorney General) v. MacIntyre*, [1982] 1 S.C.R. 175 at 185, Dickson J. [*MacIntyre*]; see *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 at para. 22, La Forest J. [*CBC v. New Brunswick*]; *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522 at paras. 1, 36, Iacobucci J. [*Sierra Club*]; *Re Vancouver Sun*, 2004 SCC 43 at para. 24, Iacobucci and Arbour JJ.; *Canada (Attorney General) v. O'Neill*, [2004] O.J. No. 4649 at paras. 45, 47 (S.C.J.), Ratushny J. [*O'Neill*].

[14] Although the media are generally private commercial organizations (with the exception of the CBC), by virtue of their role in Canadian political life generally, and in the administration of justice specifically, the media – as an institution – have what might be regarded as quasi-constitutional status. Their private nature, with whatever drawbacks that might entail, is a means for preserving their independence from the State. We might also keep in mind the comments of Osler J.: "It is easy to become impatient with the press and to criticize it for what may at times appear to be sensationalism. It is not necessary that the motives of the press be altruistic for the importance of press freedom to be apparent:" *Canadian Newspapers Co. v. Canada (A.G.)* (1986), 55 O.R. (2d) 737 at 748 (H.C.) [*Cdn. Newspaper*].

[15] *R. v. Mentuck*, [2001] 3 S.C.R. 442 at para. 51, Iacobucci J.; *Edmonton Journal* v. *Alberta*, [1989] 2 S.C.R. 1326 at paras. 4, 5, Cory J.; *Dagenais v. CBC*, [1994] 3 S.C.R. 835 at para. 84, Lamer C.J.C.; *Edmonton (City) v. Kara* (1995), 164 A.R. 64 at para. 6 (Q.B.), Berger J., as he then was; *Re Vancouver Sun*, *supra* note 13 at para. 26.

an interest in the confirmation and validation of our fundamental social norms, in their application to particular circumstances. Criminal law cases are "everyone's business" in a way that many types of private disputes are not. One might argue that the openness of criminal trials serves all three interests protected by s. 2(b) of the *Charter* – the promotion of truth, political or social participation, and self-fulfillment.[16]

[16] The news media are the means by which litigation openness is typically achieved for members of the public who are neither justice system participants nor legal researchers. In Veit J.'s words, "[t]he media stand in for the public."[17] And, according to Cory J., we "rely in large measure upon the press to inform [us] about court proceedings."[18] La Forest J. has commented that

> it is evident that s. 2(b) protects the freedom of the press to comment on the courts as an essential aspect of our democratic society. It thereby guarantees the further freedom of members of the public to develop and to put forward informed opinions about the courts. As a vehicle through which information pertaining to these courts is transmitted, the press must be guaranteed access to the courts in order to gather information.[19]

[17] Furthermore, s. 11(d) of the *Charter* protects an accused's right to a fair and *public* hearing: "s. 11(d) guarantees not only an open courtroom, but the right to have the media access that courtroom and report on the proceedings."[20] Public scrutiny, through the media, "ensures that the judicial system remains in the business of conducting fair trials, not mere show trials or proceedings in which conviction is a foregone conclusion;" and "ensures that the state does not abuse the public's right to

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[16] *Dagenais*, *ibid.* at para. 71; *Sierra Club*, *supra* note 13 at paras. 74-75. Iacobucci J. points out, however, that insofar as the "self-fulfillment" aspect of freedom of expression focuses on individual expression, this particular aspect of freedom of expression "does not closely relate to the open court principle": *Sierra Club*, *ibid.* at para. 80.

[17] *John Doe v. Roe* (1999), 243 A.R. 146 at para. 21 (Q.B.); *R. v. Quintal* (2003), 335 A.R. 14 at paras. 123, 129 (Prov. Ct.), Lefever P.C.J.

[18] *Edmonton Journal v. Alberta*, *supra* note 15 at para. 10, Cory J.; *CBC v. New Brunswick*, *supra* note 13 at para. 23, La Forest J.

[19] *CBC v. New Brunswick*, *ibid.* at para. 26, La Forest J.

[20] *Mentuck*, *supra* note 15 at para. 52.

be presumed innocent, and does not institute unfair procedures."[21] Openness can also "vindicate a person who is acquitted, particularly when the acquittal is surprising and perhaps shocking to the public."[22]

2. Limiting access and non-disclosure

[18] Despite the strong interests in openness, limitations of access or non-disclosure of litigation information may be supported by constitutional or public policy arguments.

[19] Paragraph 11(d) and s. 7 of the *Charter* protect an accused's right to a fair trial. (The public, too, has an interest in the preservation of fair trials.[23]) An accused's rights may be jeopardized by excessive or improper pre-trial publicity or publicity during trial, if the accused is tried by jury.[24] To protect an accused's constitutional rights, some restrictions on openness may be required.

[20] Restrictions on openness may also be required for non-constitutional public policy purposes, relating to the promotion of the administration of criminal justice.[25] For example, non-disclosure may be necessary to protect undercover police investigators, to protect ongoing investigations, or to protect investigative

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[21] *Ibid.* at para. 53.

[22] *Ibid.* at para. 54.

[23] *Dagenais*, *supra* note 15 at para. 75.

[24] The usual objective of a publication ban is the diminution of the risk that a trial might be tainted by unfairness, as through the impact of pre-trial publicity on the likelihood of selecting an impartial jury: *ibid.* at para. 97. If an accused has not elected trial by jury, this risk is virtually eliminated: "In my view, an individual who has elected to be tried by judge alone cannot also claim that his fair trial rights have been breached by excessive pre-trial publicity. This was the view of the Newfoundland Court of Appeal in *R. v. Burke (No. 3)* (1994), 117 Nfld. & P.E.I.R. 191 at 208 (*per* Gushue J.A., dissenting on another point). The process of electing the mode of trial is a voluntary exercise freely undertaken by the accused. It follows that an accused must accept all of the consequences flowing from his choice of mode of trial. One of these is that if trial by judge alone is selected it must be assumed that a trial judge trained to be objective and well-versed in the legal burden resting upon the prosecution can readily disabuse him- or herself of the prejudicial effects of pre-trial publicity:" *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97 at para. 139, Cory J. [*Phillips*]. Sequential separate jury trials of parties to the same offence entails significant concern about whether publicity respecting one trial will taint a later jury trial.

[25] *Mentuck*, *supra* note 15 at para. 31; See also *Sierra Club*, *supra* note 13 at para. 54.

techniques.[26] In *Dagenais*, Lamer C.J.C. also commented that non-disclosure might serve the purposes of (e.g.) "[maximizing] the chances that witnesses will testify," by eliminating concerns relating to publicity; protecting vulnerable witnesses other than police witnesses; preserving individuals' privacy;[27] encouraging the reporting of sexual offences;[28] and protecting national security.[29] In *CBC v. New Brunswick*, La Forest J. confirmed that the protection of privacy interests, particularly those of witnesses and victims, could be a legitimate objective of the court's power to regulate the publicity of its proceedings.[30]

3. Balancing

[21] There may be good reasons for or against openness. How can it be determined whether or to what extent openness or closure should prevail?

a. Principles

[22] On the level of constitutional rights themselves, the *Charter* does not expressly provide an inter-sectional conflict-resolution mechanism. The *Charter* does not establish a hierarchy or priority scheme for constitutionally-protected rights. In particular, fair trial interests do not have automatic priority over freedom of expression interests:

> A hierarchical approach to rights, which places some over others, must be avoided, both when interpreting the *Charter* and when developing the common law. When the protected rights of two individuals come into conflict, as can occur in the case of publication bans, *Charter* principles require a balance to be achieved that fully respects the importance of both sets of rights.[31]

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[26] *Mentuck*, *ibid.* at para. 31.

[27] That is, the privacy of witnesses, complainants, and individuals who may be referred to in evidence. Their privacy may be constitutionally protected under (depending on the circumstances) ss. 7 or 8 of the *Charter*. See *Quintal*, *supra* note 17 at paras. 197-203; *Muir v. Alberta* (1995), A.J. No. 1656 at paras. 42-50 (Q.B.), Veit J.

[28] See *CBC v. New Brunswick*, *supra* note 13 at para. 43, La Forest J.

[29] *Dagenais*, *supra* note 115 at para. 83.

[30] *CBC v. New Brunswick*, *supra* note 13 at para. 39.

[31] *Dagenais*, *supra* note 15 at para. 72.

[23] That is, to the extent possible – in legislation, at common law, and through the exercise of judicial discretion – the maximum operation for each relevant right must be achieved, through balancing.

[24] Insofar as a conflict occurs between constitutionally-protected rights and non-constitutional public interests, the resolution could take place through the jurisprudence established under s. 1 of the *Charter* or through the exercise of judicial discretion. Again, to the extent possible, the maximum operation for constitutionally-protected rights must be achieved.

[25] On a practical level, despite the theoretical parity of disclosure and non-disclosure interests, balancing allocates a burden. Those urging restrictions of openness or non-disclosure respecting court proceedings (whether by supporting legislation or by applying for a non-disclosure order) bear the burden of persuasion – "covertness is the exception and openness the rule."[32] Restrictions must be pursued; they must be justified.

[26] Two main conditions must be satisfied to support restrictions on access or non-disclosure:

(i) the restriction or non-disclosure must be necessary to prevent a serious risk to the proper administration of justice, because alternative reasonably available measures will not prevent the risk; and

(ii) the salutary effects of restriction or non-disclosure must outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.[33]

[27] These conditions may be parsed a little more finely: Restricting access or non-disclosure is justified only if

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[32] *MacIntyre*, *supra* note 13 at 185; see *CBC v. New Brunswick*, *supra* note 13 at para. 22; *Sierra Club*, *supra* note 13 at paras. 1, 36; *Re Vancouver Sun*, *supra* note 13 at para. 31; *O'Neill*, *supra* note 13 at para. 51.

[33] *Mentuck*, *supra* note 15 at para. 32. This standard "clearly reflects the substance of the *Oakes* test applicable when assessing legislation under s. 1 of the *Charter*": *Dagenais*, *supra* note 15 at para. 73.

(A) a legitimate objective is served – i.e., restricting access or non-disclosure protects against real and substantial risks to constitutional rights or the administration of justice;[34]

(B) the existence of the alleged risks is supported by evidence;[35]

(C) restricting access or non-disclosure would have a rational connection to securing the objectives or reducing the risks;[36]

(D) the restrictions or non-disclosure are as narrowly circumscribed as practically possible;[37]

(E) the restrictions or non-disclosure are necessary, because reasonably available and effective alternative measures will not secure the objective or reduce the risks;[38] and

(F) the salutary effects likely to be accomplished by the contended-for restrictions or non-disclosure outweigh the likely deleterious effects of the

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[34] *Dagenais*, *ibid.* at paras. 74, 75.

[35] *Sierra Club*, *supra* note 13 at para. 46; *O'Neill*, *supra* note 13 at para. 31.

[36] "If any adverse influence of a publication on jurors can be remedied by means short of banning the publication, then it might well be argued that there is no rational connection between the publication ban and the objective of preventing the jury from being adversely affected by information other than that presented in evidence during the trial:" *Dagenais*, *supra* note 15 at para. 91. Pre-trial publicity is not, in itself, a sufficient basis for granting a publication ban: *Phillips*, *supra* note 24 at 165.

[37] *Dagenais*, *ibid.* at para. 79. According to Gonthier J. (dissenting), "[a] ban must . . . be carefully limited both in terms of temporal and geographic application:" *ibid.*, at para. 173. In *Mentuck*, *supra* note 15 at para. 36, Iacobucci J. confirmed that the ban should be restricted "as far as possible without sacrificing the prevention of the risk". Hence, e.g., the desirability of "sunset clauses" for non-disclosure orders, if the risks averted through non-disclosure will abate over time.

[38] Alternative measures could include adjourning the trial, changing venue, sequestering jurors, allowing challenges for cause during jury selection, and strong judicial directions to the jury: *Dagenais*, *ibid.* at para. 91. Gonthier J. (dissenting), however, did point out the extreme costs of such measures, particularly for jury sequestration: *ibid.* at para. 178. Lamer C.J.C. also seemed to assume broader scope for the challenge for cause of potential jurors than is typical in Canada – Gonthier J. usefully pointed this out at para. 179. The Publication Bans Committee of the Criminal Section of the Uniform Law Conference of Canada noted that the use of adjournments could threaten an accused's right to trial within a reasonable time, protected under s. 11(b) of the *Charter* – i.e., the delay inherent in some alternative measures could engage yet another constitutional complication for balancing: Uniform Law Conference of Canada, *Report of the Publication Bans Committee*, Criminal Law Section, 1996, online: <http://www.law.ualberta.ca/alri/ulc/96pro/e96h.htm> [ULCC].

> restrictions or non-disclosure on other constitutional and public policy interests.[39]

[28] The efficacy of restriction or non-disclosure must be considered at several analytical stages, "since it is necessary to consider how efficacious a [measure] will be before deciding whether [it] is necessary, whether alternative measures would be equally successful at controlling the risk of trial unfairness, and whether the salutary effects of the [measures] are outweighed by its negative impact on freedom of expression."[40]

b. Legal measures

[29] Balancing can be achieved through two main sorts of legal measures.

[30] First, statute may categorically forbid disclosure or access.

[31] Second, statute, rules of court, or common law may provide a judge with the discretion to permit or forbid access or restrict disclosure on a case-by-case basis. Statutory provisions or rules of court may or may not establish criteria relevant to the exercise of this discretion and may or may not establish procedures.

[32] The acceptability of the first sort of measure would typically be assessed under ss. 2(b), 11(d) and 7 of the *Charter* (to determine whether the measure limits rights

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[39] "In many instances, the imposition of a measure will result in the full, or nearly full, realization of the legislative objective. In these situations, the third step of the proportionality test calls for an examination of the balance that has been struck between the objective in question and the deleterious effects on constitutionally protected rights arising from the means that have been employed to achieve this objective. At other times, however, the measure in issue, while rationally connected to an important objective, will result in only the partial achievement of this object. In such cases, I believe that the third step of the second branch of the *Oakes* test requires both that the underlying objective of a measure and the salutary effects that actually result from its implementation be proportional to the deleterious effects the measure has on fundamental rights and freedoms. A legislative objective may be pressing and substantial, the means chosen may be rationally connected to that objective, and less rights-impairing alternatives may not be available. Nonetheless, even if the importance of the objective itself . . . outweighs the deleterious effects on protected rights, it is still possible that the actual salutary effects of the legislation will not be sufficient to justify these negative effects:" *Dagenais*, *ibid.* at para. 92; "there must be a proportionality between the deleterious effects of the measures which are responsible for limiting the rights or freedoms in question and the objective, and there must be a proportionality between the deleterious and the salutary effects of the measures:" *ibid.*, at para. 95.

[40] *Ibid.* at para. 90.

and freedoms), and under s. 1 of the *Charter* (to determine whether the measure is a reasonable limitation of those rights and freedoms). The s. 1 analysis would be governed by the principles identified above.

[33] Statutory provisions, rules of court, or common law doctrines supporting discretionary restrictions or non-disclosure should receive similar treatment. The constitutional acceptability of any statutory or subordinate provisions regulating discretion would also be assessed under the *Charter*. Common law rules regulating discretion must reflect the identified principles: "Discretion must be exercised within the boundaries set by the principles of the Charter; exceeding these boundaries results in a reversible error of law."[41] Furthermore, particular exercises of discretion must meet the standards set by those principles. If an exercise of discretion "fails to meet this standard (which clearly reflects the substance of the Oakes test applicable when assessing legislation under s. 1 of the *Charter*), then, in making the order, the judge [commits] an error of law...."[42]

[34] To ensure compliance with constitutional requirements, any non-disclosure order that is granted should be reduced to writing (to prevent dispute about the actual terms of the order). To ensure maximum reasonable freedom of expression, the order should be as restricted as possible, in relation to (e.g.) the information, geographical area, and temporal period covered.

B. Procedural Implications of Balancing

[35] Procedure is not an issue for categorical statutory rules. If the material facts obtain, the legal consequences follow.

[36] In the case of statute or common law authorizing the exercise of discretion, some procedures to engage and elicit discretion are required. Given that "covertness is the exception and openness is the rule," putting balancing into practice requires (at least)

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[41] *Ibid.* at para. 68; See also *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 at 1078-1079; *Michaud v. Quebec (Attorney General)*, [1996] 3 S.C.R. 3 at para. 17, Lamer C.J.C; *Re Vancouver Sun*, *supra* note 13 at para. 31.

[42] *Dagenais*, *supra* note 15 at para. 73; *O'Neill*, *supra* note 13 at para. 21.

an applicant seeking the restriction of access or non-disclosure, a court, application materials, a notice period, a form of notice, and respondents to the application.

[37] This last element is tricky. Ordinarily, criminal trials involve only two sets of parties, the Crown and the accused. Neither, though, may be concerned with the openness of proceedings. Who then is to represent the public interests in openness and disclosure?

1. The media as representatives of the public interest

[38] We have no "official" public-interest representative, whether corporate or individual. *Dagenais* indicates that the representative of the public interest should be the media.[43] A further complication is that *Dagenais* did not specify that any particular media collective association has representative status. By default – and this is an interesting political and theoretical point – individual media organizations are entitled to represent the public interests in access and disclosure.[44]

2. Procedural guidance

[39] In *Dagenais*, Lamer C.J.C. provided some procedural guidance, tailored for discretionary publication bans:

(a) The Crown or the accused may make the application.[45] Lamer C.J.C. did not specify the type of documents that should support the application.

(b) The application may be made

  (i) to the trial judge, if the trial judge has been appointed;[46]

  (ii) if a trial judge has not been appointed, to a judge of the same level of court at which the case shall be heard; or

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[43] If the media fail to intervene, the judge must "take account of these interests without the benefit of argument." *Mentuck*, *supra* note 15 at para. 38. That is, if the media are not actually present, they should be notionally present.

[44] *R. v. Eurocopter Canada Ltd.*, [2004] O.J. No. 2195 at para. 22 (S.C.J.) [*Eurocopter*], Then J.: "the CBC was granted standing as ordained by the decision of the Supreme Court of Canada in *Dagenais* ... to represent the interest of the media in freedom of expression and public access." On the issue of the media as "agent" for the public, see *Blackman v. British Columbia Review Board* (1995), C.C.C. (3d) 412 (B.C.C.A.) and ULCC, *supra* note 38.

[45] *Dagenais*, *ibid.* at paras. 16, 52.

[46] L'Heureux-Dubé J. agreed with Lamer C.J.C. that "whenever possible a motion for a publication ban should be made before the appointed trial judge:" *ibid.* at para. 152.

(iii) if the level of court has not been established (either because the level of court is not set by statute or the accused has not exercised an election), to a superior court judge.[47]

(c) The media should be given notice of the application. Lamer C.J.C. was alive to the practical complications: "Which media are to be given notice, and how is such notice to be given? Do the media include all newspapers, television stations, and radio stations potentially affected by the ban? How is notice to be served?"[48] Rather than identifying (or providing criteria for identifying) relevant media outlets and specifying the mode of notice, Lamer C.J.C. left notification issues to judicial discretion, provincial rules of court, and the law: "Exactly who is to be given notice and how notice is to be given should remain in the discretion of the judge to be exercised in accordance with the provincial rules of criminal procedure and the relevant case law."[49]

(d) Lamer C.J.C. distinguished between the entitlement of the media to receive notice and their standing to appear or make representations in the application. While his reasons at times suggest that whether or not any of the media receive standing remains within the judge's discretion, Lamer C.J.C. did appear to direct that at least some members of the media should be granted standing, if any seek it: "the court should give standing to the media who seek standing."[50] (It would not make sense to make the media the representatives of the public interest, and then exclude them from practical participation in applications.) Again, Lamer C.J.C. left the issues of which particular media outlets should receive standing and what the scope of their participation should be to the discretion of the judge, informed by rules of court and the law:

> Which members of the media are to be given standing? Does standing include standing to do any or all of the following: cross-examine witnesses, call viva voce evidence, file affidavit

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[47] *Ibid.*

[48] *Ibid.* at para. 49.

[49] *Ibid.* It is fair to observe that the jurisprudence on third-party standing in criminal trials is exceedingly sparse.

[50] *Ibid.* at para. 57.

> evidence, and present oral and/or written arguments? Again, given that I have concluded that motions for publication bans made in the context of criminal proceedings are criminal in nature, the solution to these practical problems is to be found in the provincial rules of criminal procedure and the relevant case law.[51]

Hence, "[i]f the media wish to oppose a motion for a ban brought in provincial court [or provincial superior court], they should attend at the hearing of the motion, argue to be given status, and if given status, participate in the motion."[52]

(c) As for the hearing of the application:

(i) The application must be heard in the absence of the jury.[53]

(ii) At least in cases like *Dagenais*, in which pre-existing publications may, if broadcast, affect trial fairness, the judge should review the publication before making a determination respecting the ban.[54]

[40] There must be a sufficient evidential basis on the record to permit the judge to assess the application.[55] If the facts are not in dispute, the statements of counsel may suffice.[56] If not, the applicant may have the evidence heard *in camera*, in a *voir dire*.[57]

[41] *Dagenais* provides a sort of procedural template which could be applied to a variety of discretionary processes through which access to information or the courts are limited. Its procedural advice, however, is not exhaustive.

3. Procedural *lacunae*

[42] Dagenais leaves some practical procedural issues for resolution under provincial rules of court, including

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[51] *Ibid.* at para. 50; see para. 58.

[52] *Ibid.* at paras. 56, 57.

[53] *Ibid.* at para. 48.

[54] *Ibid.* at para. 98.

[55] *Mentuck*, *supra* note 1515 at para. 26.

[56] *CBC v. New Brunswick*, *supra* note 13 at para. 72.

[57] *Ibid.*

(a) the further specification of hearing judges;
(b) the materials required to support the application (form of notice of motion, any additional materials such as affidavit evidence);
(c) the notice period;
(d) the manner in which media outlets are selected for notification;
(e) the manner in which notification is to be given to parties, and, in particular, to the media;
(f) whether some form of notice of granted orders should be established; and
(g) whether the *Dagenais* approach should be extended to other statutory and common law discretionary non-disclosure or access-limiting orders.

[43] *Dagenais* and its progeny establish the substantive and procedural guidelines against which statutory and common law non-disclosure rules must be judged. The next Chapter shall describe the main statutory and common law non-disclosure rules.

CHAPTER 3. CURRENT DOCTRINE LIMITING ACCESS OR DISCLOSURE

[44] Current *Criminal Code* provisions and the common law allow for access to the courts to be limited and for information to be preserved from disclosure. Procedures authorizing constraints on access and disclosure track the process of the administration of criminal justice, and are found at the investigative, judicial interim release, preliminary inquiry, trial, and appeal stages of the processing of charges. The legal mechanisms of constraint serve the fair trial interests of accuseds or the interests of the administration of justice or both; some (but not all) of these mechanisms contemplate exercises of discretion and application procedures that could and should follow the *Dagenais* guidelines.

[45] These mechanisms may, for the purposes of discussion, be understood to be of three main types – "*in camera*" provisions, permitting the exclusion of some or all members of the public from judicial proceedings; "sealing orders," restricting public access to court records (whether these records concern the investigatory stage of a matter or trial records); and publication bans, restricting the disclosure of information relating to the litigation or arising in the course of litigation.

A. *"In Camera"* Provisions[58]

1. Subsection 486(1)

[46] The main "*in camera*" provision is s. 486(1) of the *Criminal Code*, which provides as follows:[59]

> Any proceedings against an accused shall be held in open court, but where the presiding judge, provincial court judge or justice, as the case may be, is of the opinion that it is in the interest of public morals, the maintenance of order or the proper administration of justice, or that it is necessary to prevent injury to international relations or national defence or national security, to exclude all or any members of the public from the court room for all or part of the proceedings, he or she may so order.

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[58] Applications under s. 37 of the *Canada Evidence Act* formerly were governed by "special rules" that required *in camera* hearings. The statutory culprit, s. 37.21, has been repealed: S.C. 2004, c. 12, s. 18 (Bill C-14). Forensic DNA warrant applications made before Provincial Court judges may be held *ex parte* – although this is not mandatory. The *ex parte* nature of these investigatory proceedings is constitutionally acceptable: *R. v S.A.B.*, [2003] 2 S.C.R. 678 at para. 56, Arbour J.

[59] This provision was held to be constitutional in *CBC v. New Brunswick*, *supra* note 13.

[47] This provision has a number of features:

(i) It confirms the "open court" rule, and, by implication, the burden lying on those seeking to limit openness.

(ii) It confirms the judge's discretion to grant or not to grant the *in camera* order.

(iii) It identifies objectives that may be served by limiting openness:

(A) protecting public morals,

(B) maintaining order,

(C) maintaining the proper administration of justice, which, under s. 486(1.5), includes "[ensuring] the protection of justice system participants who are involved in the proceedings," and

(D) protecting

(1) international relations,

(2) national defence, or

(3) national security.

(iv) It gives the judge latitude to exclude

(A) all or only some members of the public, for

(B) all or only part of the proceedings.

(v) It does not expressly establish any procedures.

[48] The discretion established by this provision must comply with the *Dagenais* substantive standards.[60] Consequently, the *Dagenais* procedural standards must be followed in applications under s. 486(1).[61]

2. Publication ban hearings respecting identity

[49] Under s. 486(4.6), a publication ban hearing respecting the identities of certain witnesses "may be in private" – the judge has a discretion to exercise. Subsection 486(4.5) provides for notice to "affected persons," which could include the media. The *Dagenais* substantive and procedural standards should apply to this "*in camera*" element of the application.

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[60] *Ibid.* at paras. 51, 52, 69.

[61] *Ibid.* paras. 70-75.

3. Investigative hearings

[50] Section 83.28 of the *Criminal Code* establishes "investigative hearings" respecting terrorism offences. Section 83.28 provides as follows:

> (1) In this section and section 83.29, "judge" means a provincial court judge or a judge of a superior court of criminal jurisdiction.
>
> (2) Subject to subsection (3), a peace officer may, for the purposes of an investigation of a terrorism offence, apply ex parte to a judge for an order for the gathering of information.
>
> (3) A peace officer may make an application under subsection (2) only if the prior consent of the Attorney General was obtained.
>
> (4) A judge to whom an application is made under subsection (2) may make an order for the gathering of information if the judge is satisfied that the consent of the Attorney General was obtained as required by subsection (3) and
>
> (a) that there are reasonable grounds to believe that
>
> (i) a terrorism offence has been committed, and
>
> (ii) information concerning the offence, or information that may reveal the whereabouts of a person suspected by the peace officer of having committed the offence, is likely to be obtained as a result of the order; or
>
> (b) that
>
> (i) there are reasonable grounds to believe that a terrorism offence will be committed,
>
> (ii) there are reasonable grounds to believe that a person has direct and material information that relates to a terrorism offence referred to in subparagraph (i), or that may reveal the whereabouts of an individual who the peace officer suspects may commit a terrorism offence referred to in that subparagraph, and
>
> (iii) reasonable attempts have been made to obtain the information referred to in subparagraph (ii) from the person referred to in that subparagraph.
>
> (5) An order made under subsection (4) may
>
> (a) order the examination, on oath or not, of a person named in the order;
>
> (b) order the person to attend at the place fixed by the judge, or by the judge designated under paragraph (d), as the case may be, for the examination and to remain in attendance until excused by the presiding judge;
>
> (c) order the person to bring to the examination any thing in their possession or control, and produce it to the presiding judge;
>
> (d) designate another judge as the judge before whom the examination is to take place; and

(e) include any other terms or conditions that the judge considers desirable, including terms or conditions for the protection of the interests of the person named in the order and of third parties or for the protection of any ongoing investigation.

(6) An order made under subsection (4) may be executed anywhere in Canada.

(7) The judge who made the order under subsection (4), or another judge of the same court, may vary its terms and conditions.

(8) A person named in an order made under subsection (4) shall answer questions put to the person by the Attorney General or the Attorney General's agent, and shall produce to the presiding judge things that the person was ordered to bring, but may refuse if answering a question or producing a thing would disclose information that is protected by any law relating to non-disclosure of information or to privilege.

(9) The presiding judge shall rule on any objection or other issue relating to a refusal to answer a question or to produce a thing.

(10) No person shall be excused from answering a question or producing a thing under subsection (8) on the ground that the answer or thing may tend to incriminate the person or subject the person to any proceeding or penalty, but

(a) no answer given or thing produced under subsection (8) shall be used or received against the person in any criminal proceedings against that person, other than a prosecution under section 132 or 136; and

(b) no evidence derived from the evidence obtained from the person shall be used or received against the person in any criminal proceedings against that person, other than a prosecution under section 132 or 136.

(11) A person has the right to retain and instruct counsel at any stage of the proceedings.

(12) The presiding judge, if satisfied that any thing produced during the course of the examination will likely be relevant to the investigation of any terrorism offence, shall order that the thing be given into the custody of the peace officer or someone acting on the peace officer's behalf.

[51] The investigative hearing provisions have been held to be constitutional, with the "reading in" of use and derivative use immunity under s. (10)(a) and (b) for

extradition and deportation proceedings, in addition to the immunities for criminal proceedings.[62]

[52] Section 83.28 concerns three time periods. First, the section contemplates an *ex parte* application for an order for the gathering of information from a named individual. Second, if the order is granted, the investigatory hearing is held. Third, following completion of the hearing, decisions must be made respecting the disclosure of information emerging in the investigatory hearing.

[53] The *ex parte* application should be *in camera*, as contemplated by s. 83.28(2).[63] The hearing and information about the hearing, however, are presumptively public. The *Dagenais/Mentuck* tests must be applied to determine whether information should be subject to any non-disclosure orders.[64] The judge may make the appropriate orders under s. 83.28(5)(e).

4. *Voir dires* in sexual offence cases

[54] The *Criminal Code* contains mandatory *in camera* provisions for *voir dires* in sexual offence cases.

[55] Under s. 276.1(3), if an accused applies to introduce sexual history evidence relating to a complainant or witness, the application must be considered "with the jury and the public excluded." Under s. 276.2(1), "the jury and the public shall be excluded" from the evidential hearing itself.

[56] Under s. 278.4(1), a hearing to determine whether records containing personal information must be produced to a court for review must be held *in camera*. If, following review of a record, the judge holds a hearing to determine whether the records must be produced to the accused, s. 278.6(1) requires that the hearing be *in camera*.

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[62] *Re Application under s. 83.29 of the Criminal Code* (2004), 240 D.L.R. (4th) 81, 2004 SCC 42, Iacobucci and Arbour JJ.

[63] *Re Vancouver Sun*, *supra* note 13 paras. 36, 45.

[64] *Ibid.* at paras. 38-40, 46-47.

[57] These categorical or mandatory *in camera* provisions do not entail any procedural concerns, since no discretion need be exercised nor application be made.

5. Proceeds of crime: Applications for review

[58] A mandatory *in camera* provision is created for the purposes of reviews in the proceeds of crime area. Subsection 462.34(5) provides as follows:

> For the purpose of determining the reasonableness of legal expenses referred to in subparagraph (4)(c)(ii), a judge shall hold an *in camera* hearing, without the presence of the Attorney General, and shall take into account the legal aid tariff of the province.

[59] This mandatory *in camera* provision does not entail any procedural concerns.[65]

6. Disposition hearings

[60] Subsection 672.5(6) of the *Criminal Code* provides that a court or review board that conducts a disposition hearing under Part XX.1 (Mental Disorder) may, if the court or review board "considers it in the best interests of the accused and not contrary to the public interest . . . order the public or any members of the public to be excluded from the hearing or any part of the hearing." This discretionary determination presumes that the hearing will be open to the public. The public may certainly have an interest in the nature of the disposition – particularly since an important consideration in the hearing is the protection of the public from dangerous persons (s. 672.54). These factors suggest that the *Dagenais* approach is applicable. On the other hand, the disposition hearing is not a trial or adversarial process, and the context is the special procedural regime for the special rules governing mentally disordered persons accused of criminal offences.[66] An argument may be made that the mental disorder context is distinguishable from the type of cases to which *Dagenais* was intended to apply.

[61] It is not necessary for this memorandum to settle the issue of whether *Dagenais* does apply to disposition hearings: if *Dagenais* does apply, then so do this memorandum's comments and proposals concerning procedure.

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[65] Sealing orders or publication bans might also be ordered respecting materials filed and information disclosed in the course of the hearing: see, e.g., *R. v. Wilson* (2001), 196 N.S.R. (2d) 272, 2001 NSSC 129, Hood J.

[66] *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625 at paras. 52, 54, 62, McLachlin J., as she then was.

B. Sealing Orders

[62] Sealing orders prevent or restrict public access to court records. These orders are of three main types, which apply at different stages of the litigation process – respecting investigatory records, court exhibits, and entire files.

1. Sealing investigatory records

[63] In "wiretap" cases, the confidentiality of authorization application materials are governed by ss. 187, 193, and 196 of the *Criminal Code*, and the *Charter* jurisprudence relating to disclosure, such as the *Dersch* case.[67] A discussion of these provisions and the *Charter* jurisprudence in which they are embedded lies outside the scope of this memorandum.

[64] The *Criminal Code* establishes the authority to make sealing orders relating to other warrants in s. 487.3:[68]

> (1) A judge or justice may, on application made at the time of issuing a warrant under this or any other Act of Parliament or of granting an authorization to enter a dwelling-house under section 529 or an authorization under section 529.4 or at any time thereafter, make an order prohibiting access to and the disclosure of any information relating to the warrant or authorization on the ground that
>
> (a) the ends of justice would be subverted by the disclosure for one of the reasons referred to in subsection (2) or the information might be used for an improper purpose; and
>
> (b) the ground referred to in paragraph (a) outweighs in importance the access to the information.
>
> (2) For the purposes of paragraph (1)(a), an order may be made under subsection (1) on the ground that the ends of justice would be subverted by the disclosure
>
> (a) if disclosure of the information would
>
> (i) compromise the identity of a confidential informant,
>
> (ii) compromise the nature and extent of an ongoing investigation,
>
> (iii) endanger a person engaged in particular intelligence-gathering techniques and thereby prejudice future

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[67] *Dersch* v. *Canada (Attorney General)*, [1990] 2 S.C.R. 1505.

[68] See, generally, *Eurocopter*, *supra* note 44; *Toronto Star Newspapers Ltd. v. Ontario* (2003), 178 C.C.C. (3d) 349 (Ont. C.A.) [*Toronto Star*]; *Re Toronto (City) Police Services*, [2004] O.J. No. 1281 (Ct. J.); *National Post Co. v. Canada (Attorney General)* (2003), 176 C.C.C. (3d) 432 (Ont. S.C.J.); *Phillips v. Vancouver Sun*, [2004] B.C.J. No. 14 (C.A.).

> investigations in which similar techniques would be used, or
>
> (iv) prejudice the interests of an innocent person; and
>
> (b) for any other sufficient reason.
>
> (3) Where an order is made under subsection (1), all documents relating to the application shall, subject to any terms and conditions that the justice or judge considers desirable in the circumstances . . . be placed in a packet and sealed by the justice or judge immediately on determination of the application, and that packet shall be kept in the custody of the court in a place to which the public has no access . . . and shall not be dealt with except in accordance with the terms and conditions specified in the order . . . .
>
> (4) An application to terminate the order or vary any of its terms and conditions may be made to the justice or judge who made the order or a judge of the court before which any proceedings arising out of the investigation in relation to which the warrant was obtained may be held.

[65] Section 487.3 is doubtless of greater practical concern to the Provincial Court than the Court of Queen's Bench, but there are instances in which a Court of Queen's Bench justice may be involved in the issuance of a warrant.

[66] This section does involve an exercise of discretion, and it does identify public interest objectives served by restricting access, of the sort described in *Mentuck* and *Dagenais*. The issuing judge or justice must apply the *Dagenais/Mentuck* balancing test – i.e., the *Dagenais/Mentuck* substantive rules – in deciding whether to make the sealing order.[69]

[67] But while these substantive rules should be applied, the procedural requirements – specifically notice to the media – should not apply, at least respecting sealing orders made at the time that warrants are issued. It would not make any sense to require that the media, the target, or any third parties have any notice of sealing order application. Providing notice would undermine the efficacy of investigations.[70]

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[69] *O'Neill*, *supra* note 13 at para. 23; *Toronto Star*, *ibid.* at para. 12.

[70] *MacIntyre*, *supra* note 13 at 187-188. Note that in *O'Neill*, *ibid.*, Ratushny J. did not suggest that the media should have been given standing in the sealing order application procedure. Ratushny J.'s concern was that the applicant R.C.M.P. member (and that individual alone) failed to provide sufficient or adequate evidence to justify the sealing order issued by the justice: *O'Neill*, *ibid.* at para. 49. In contrast, in

(continued...)

[68] An application may be made to terminate or vary an order under s. 487.3(4). Subsection (4) does not specify the applicant. This application could be made by the media. No procedure is established for this application. Once again, however, there does not appear to be any reason for the Crown to notify the media about the existence of the sealing order – in effect, to invite the media to seek the termination or variation of the order. Whether to provide notice to the media should remain within the discretion of the court.

[69] The investigatory sealing order provisions fall outside the *Dagenais* procedural guidelines.

2. Sealing orders and exhibits

[70] Veit J. provided a good summary of the substantive law in *Muir*, a civil case:

> Access to exhibits is presumed in an open justice system; exhibits are part of the court "record". Public scrutiny of judicial process is key to the democratic control of that branch of government. In Alberta, the then Deputy Attorney General of Alberta sent a circular memo to the Bar in January 1984; one paragraph of that letter read as follows:
>
> > Civil Trials: Exhibits, once entered on the Court record, are accessible for viewing by the public unless there is a statutory requirement of confidentiality, or the Court otherwise orders . . . .
>
> In addition, Canadians, including Canadian media, have a constitutionally protected right of "freedom of expression". In order to exercise this right, the media requires access to, and the right to publish, exhibits.
>
> Therefore, any restriction on either the right of access, or the freedom to speak about what has been accessed, must be made only in the clearest of circumstances. Before imposing any limitation, the court must find that some value other than open justice or freedom of expression requires protection.[71]

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[70] (...continued)
Toronto Star, *supra* note 68, the sealing order application was not made until after the warrants (issued under provincial legislation), were issued and executed. The application was made in open court, but *ex parte*. The media, in these circumstances, at least should have been given standing in the sealing order application. In *Eurocopter*, the CBC was granted standing, but in the context of the post-warrant-execution review of a sealing order: *R v. Eurocopter Canada Ltd. (No. 2)* (2003), 67 O.R. (3d) 763 at para. 6 (S.C.J.), Then J.; *R v. Eurocopter Canada Ltd. (No. 1)* (2001), 67 O.R. (3d) 756 (S.C.J.), Then J.; *Eurocopter*, *supra* note 44.

[71] *Muir*, *supra* note 27 at paras. 15-17.

[71] The authority to restrict access to exhibits lies within the inherent jurisdiction of the courts: "Undoubtedly every court has a supervisory and protecting power over its own records."[72] This supervisory and protecting power may be exercised to ensure that the integrity of exhibits are preserved,[73] to ensure that harm does not come to innocent third parties,[74] to prevent impairment of rights to appeal,[75] and to protect national security, industrial secrets, and victims of blackmail.[76]

[72] Restrictions may include restrictions on access to exhibits, on reproduction of exhibits, and on disclosure of reproductions.[77]

[73] Judges' discretionary authority to restrict access to or disclosure of exhibits must be regulated by the *Dagenais* substantive and procedural guidelines. As Dickson C.J.C. observed, long pre-*Dagenais*, "[t]he presumption . . . is in favour of public access and the burden of contrary proof lies upon the person who would deny the exercise of the right."[78]

3. Sealing orders and entire court files

[74] Again, the authority to restrict access to an entire court file lies within the inherent jurisdiction of the courts.[79] And again, this common law authority must be

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[72] *MacIntyre*, *supra* note 13 at 189; see also *Edmonton (City) v. Kara*, *supra* note 15; *Calgary Sun, a Division of Toronto Sun Publishing Corp. v. Alberta* (1996), 186 A.R. 313 (Q.B.), Lutz J.; *Re Canadian Broadcasting Corp.* v. *Giroux* (1995), 23 O.R. (3d) 621 (Gen. Div.), McRae J.; *Quintal*, *supra* note 17 at para. 148; *R. v. S.J.S.* (2000), 189 Sask. R. 137 at para. 8 (C.A.); *O'Neill*, *supra* note 13 at para. 51.

[73] *R. v. Warren* (1995), 122 D.L.R. (4th) 698 at paras. 13, 68 (N.W.T.S.C.), de Weerdt, J.

[74] *Muir*, *supra* note 27 at paras. 43-45; *Quintal*, *supra* note 17 at paras. 197-203.

[75] *Muir*, *ibid.* at para. 38

[76] *Ibid.* at para. 51; see, generally, *Quintal*, *supra* note 17 at para. 140; *R. v. Grewall* (2000), 149 C.C.C. (3d) 557 at para. 34 (B.C.S.C.), Romilly J.; and *Calgary Sun, a Division of Toronto Sun Publishing Corp. v. Alberta*, [1996] 7 W.W.R. 438 (Alta. Q.B.), Lutz J.

[77] *S.J.S.*, *supra* note 72 at para. 14; *R. v. Warren*, *supra* note 73 at para. 68.

[78] *MacIntyre*, *supra* note 13; see also *Quintal*, *supra* note 17 paras. 133-138.

[79] "It is within the discretion of a court to impound its files in a case and to deny public inspection of them, and that is often done when justice so requires:" *Parker* v. *Republican Co.*, 181 Mass 329 at 396, quoted in *Sandford v. Boston Herald-Traveler Corp.* (1945), 61 N.E. (2d) 5, which were quoted in turn in

(continued...)

regulated by the *Dagenais* substantive and procedural guidelines. There seems to be no difference in principle between sealing part of a court record, and sealing all of a court record – the same constitutional rules should apply.

C. Publication Bans

[75] The authority to make publication bans derives from (1) the inherent jurisdiction of the court, and (2) statute.

[76] Publication bans may concern specified types of information (e.g. the name of the complainant or information that would identify a complainant), all information arising from particular proceedings (e.g. information arising from a sexual history admissibility *voir dire*, or from a trial), or even the "determination" made by a judge or the judge's reasons.[80]

1. Publication bans founded on inherent jurisdiction

[77] Judges have common law authority to impose publication bans.[81]

[78] A trial judge has the authority to impose publication bans to protect the identity of witnesses[82] or to protect the fair trial rights of accuseds.[83] A "court of record" has jurisdiction to impose a publication ban to ensure that justice is done in proceedings

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[79] (...continued)
Re Attorney-General of Ontario and Yanover (1982), 68 C.C.C. (2d) 151 at 162 (Ont. Prov. Ct.), Scullion P.C.J.

[80] *Eurocopter*, *supra* note 44 at para. 105. If a publication ban has been ordered in a case, the judge's reasons for decision must comply with that order, and not make improper disclosure.

[81] *Dagenais*, *supra* note 15 paras. 68, 69.

[82] *R. v. McArthur* (1984), 13 C.C.C. (3d) 152 (Ont. H.C.J.); *R. v. Paterson* (1998), 122 C.C.C. (3d) 254 (B.C.C.A.).

[83] *R. v. Barrow* (1989), 48 C.C.C. (3d) 308 (N.S.S.C.); *R. v. Church of Scientology of Toronto (No. 6)* (1986), 27 C.C.C. (3d) 193 (Ont. H.C.J.); *R. v. Regan* (1997), 124 C.C.C. (3d) 77 (N.S.S.C.) [Regan].

before it.[84] A superior court judge has the authority to impose publication bans pursuant to his or her inherent jurisdiction.[85]

[79] Publication bans made under inherent jurisdiction are governed by the substantive and procedural standards established in *Dagenais*.

2. Statutory publication bans

[80] The statutory publication ban environment is complex. Four types of publication bans are established by statute:[86]

(a) "*per se*" mandatory publication bans;

(b) "mandatory on application" publication bans;

(c) "presumptively mandatory" publication bans; and

(d) "discretionary on application" publication bans.

a. "Per se" mandatory publication bans

[81] "'*Per se*' mandatory publication bans" are created by provisions which establish that the publication of specified information is an offence. These publication ban provisions must, of course, satisfy the substantive balancing principles of *Dagenais*, and they are subject to *Charter* scrutiny. They do not, however, involve exercises of discretion, and have no procedural features falling within the purview of this memorandum. Some examples are as follows:[87]

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[84] *Canadian Broadcasting Corp. v. Boland* (1994), 93 C.C.C. (3d) 558 (F.C.T.D.).

[85] *R. v. Unnamed Person* (1985), 22 C.C.C. (3d) 284 (Ont. C.A.); *John Doe v. Roe*, *supra* note 17.

[86] The terminology is simply a classification tool, and has no judicial approval.

[87] The term "newspaper," which occurs in many of the statutory provisions, is defined in s. 297: "any paper, magazine or periodical containing public news, intelligence or reports of events, or any remarks or observations thereon, printed for sale and published periodically or in parts or numbers, at intervals not exceeding thirty-one days between the publication of any two such papers, parts or numbers, and any paper, magazine or periodical printed in order to be dispersed and made public, weekly or more often, or at intervals not exceeding thirty-one days, that contains advertisements, exclusively or principally." An issue that lies outside the scope of this memorandum's concern is whether this definition has been overtaken by technological advances and new modes of popular media.

(i) search warrants

[82] Section 487.2 provides as follows:[88]

> (1) Where a search warrant is issued under section 487 or 487.1 or a search is made under such a warrant, every one who publishes in any newspaper or broadcasts any information with respect to
>
> (a) the location of the place searched or to be searched, or
>
> (b) the identity of any person who is or appears to occupy or be in possession or control of that place or who is suspected of being involved in any offence in relation to which the warrant was issued,
>
> without the consent of every person referred to in paragraph (b) is, unless a charge has been laid in respect of any offence in relation to which the warrant was issued, guilty of an offence punishable on summary conviction.
>
> (2) In this section, "newspaper" has the same meaning as in section 297.

(ii) preliminary inquiries

[83] Subsection 542(2) provides that

> (2) Every one who publishes in any newspaper, or broadcasts, a report that any admission or confession was tendered in evidence at a preliminary inquiry or a report of the nature of such admission or confession so tendered in evidence unless
>
> (a) the accused has been discharged, or
>
> (b) if the accused has been ordered to stand trial, the trial has ended,
>
> is guilty of an offence punishable on summary conviction.
>
> (3) In this section, "newspaper" has the same meaning as in section 297.

(iii) portions of trial heard in absence of jury

[84] Section 648 provides as follows:

> (1) Where permission to separate is given to members of a jury under subsection 647(1),[89] no information[90] regarding any portion of the

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[88] This section has been held to be an unconstitutional limitation of freedom of expression, and is likely no longer valid law: *Canadian Newspapers Co. v. Canada (Attorney General)* (1986), 28 C.C.C. (3d) 379 (Man. Q.B.); *Cdn. Newspapers*, *supra* note 14; *Girard v. Ouellet* (2001), 153 C.C.C. (3d) 217 (Que. C.A.), leave to appeal to S.C.C. refused [2001] C.S.C.R. No. 238.

[89] This provision does not apply before the jury is empanelled. Trial fairness, however, may be protected by a publication ban made pursuant to inherent jurisdiction: *R. v. Cheung* (2000), 150 C.C.C. (3d) 192 (Alta. Q.B.), *sed contra R. v. Bernardo [Publication Ban - Intervenor Status - Victim's families* (1995), 38

(continued...)

trial at which the jury is not present shall be published, after the permission is granted, in any newspaper or broadcast before the jury retires to consider its verdict.[91]

(2) Everyone who fails to comply with subsection (1) is guilty of an offence punishable on summary conviction.

(3) In this section, "newspaper" has the same meaning as in section 297.

(iv) complainant's sexual history

Section 276.3 provides as follows:

(1) No person shall publish in a newspaper, as defined in section 297, or in a broadcast, any of the following:

(a) the contents of an application under section 276.1;

(b) any evidence taken, the information given and the representations made at an application under section 276.1 or at a hearing under section 276.2;

(c) the decision of a judge, provincial court judge or justice under subsection 276.1(4), unless the judge, provincial court judge or justice, after taking into account the complainant's right of privacy and the interests of justice, orders that the decision may be published; and

(d) the determination made and the reasons provided under section 276.2, unless

(i) that determination is that the evidence is admissible, or

(ii) the judge, provincial court judge or justice, after taking into account the complainant's right of privacy and the interests of justice, orders that the determination and reasons may be published.

(2) Every person who contravenes subsection (1) is guilty of an offence punishable on summary conviction.

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[89] (...continued)
C.R. (4th) 229 (Ont. Ct. (Gen. Div.)), Lesage A.C.J. [provision applies to evidentiary rulings made by trial judge before jury empanelled].

[90] The mandatory ban applies only to information that would reasonably be expected to taint a juror's impression of the accused: *Regan*, *supra* note 83; *queried* whether the ban applies only to "prejudicial information," as opposed to "any information" – *R. v. CHBC Television, a division of WIC Television Ltd.* (1999), 132 C.C.C. (3d) 390 (B.C.C.A.).

[91] The publication ban lapses once the jury has retired to begin deliberations. The trial judge retains a discretion to ban publication, however, pursuant to the judge's inherent jurisdiction: *Toronto Sun Publishing Corp. v. Alberta (Attorney General)* (1985), 62 A.R. 315 (C.A.).

(v) "third party records" in a sexual offence cases

[85] Section 278.9 provides as follows:

> (1) No person shall publish in a newspaper, as defined in section 297, or in a broadcast, any of the following:
>
> (a) the contents of an application under section 278.3;
>
> (b) any evidence taken, the information given and the representations made at an application under section 276.4(1) or 278.6(2); or
>
> (c) the determination of the judge pursuant to subsection 278.5(1) or 278.7(1) and the reasons provided pursuant to section 278.8, unless the judge, after taking into account the interests of justice and the right to privacy of the person to whom the record relates, orders that the determination may be published.
>
> (2) Every person who contravenes subsection (1) is guilty of an offence punishable on summary conviction.

b. Mandatory on application provisions

[86] "Mandatory on application" publication bans are bans which a judge must order if a specified party applies for the ban. These statutory provisions, like the "*per se* mandatory publication bans," must meet *Charter* standards. But, again, these provisions do not require an exercise of discretion. There is no need to call on the media or any other third party to offer argument for or against the publication ban. Hence, the procedural standards of *Dagenais* are not relevant. Some examples are as follows:

(i) judicial interim release

[87] Section 517 of the *Criminal Code* provides as follows:[92]

> (1) Where the prosecutor or the accused intends to show cause under section 515, he shall so state to the justice and the justice may, and shall on the application by the accused, before or at any time during the course of the proceedings under that section, make an order directing that the evidence taken, the information given or the representations made and the reasons, if any, given or to be given

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[92] This section has been held to be a constitutionally-valid limitation of freedom of expression: *Global Communications Ltd. v. Canada (Attorney General)* (1984), 44 O.R. (2d) 609 (C.A.).

by the justice[93] shall not be published in any newspaper or broadcast before such time as

(a) if a preliminary inquiry is held, the accused in respect of whom the proceedings are held is discharged; or

(b) if the accused in respect of whom the proceedings are held is tried or committed to stand trial, the trial is ended.

(2) Everyone who fails without lawful excuse, the proof of which lies on him, to comply with an order made under subsection (1) is guilty of an offence punishable on summary conviction.

(3) In this section, "newspaper" has the same meaning as in section 297.

[88] Section 517 applies, with the necessary modifications, in a bail review: ss 520(9); 521 (10). It also applies to judicial interim release applications heard by Queen's Bench justices (e.g. in murder cases): s. 522(5).

[89] The ban is mandatory only on the application of the accused.

(ii) preliminary inquiries

[90] Section 539 of the *Criminal Code* provides as follows:[94]

(1) Prior to the commencement of the taking of evidence at a preliminary inquiry,[95] the justice holding the inquiry

(a) may, if application therefor is made by the prosecutor, and

(b) shall, if application therefor is made by any of the accused,

make an order directing that evidence taken at the inquiry shall not be published in any newspaper or broadcast before such time as, in respect of each of the accused,

(c) he is discharged; or

(d) if he is ordered to stand trial, the trial is ended ....

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[93] The scope of the ban does not extend to the decision granting or refusing release: *R. v. Forget* (1982), 35 O.R. (2d) 238 (C.A.). Neither does this section confer jurisdiction to order a publication ban respecting the identity of the accused, or respecting information journalists have obtained from the police: *Southam Inc. v. Brassard* (1987), 38 C.C.C. (3d) 74 (Que. S.C.).

[94] This section has been held to be a constitutionally-valid limitation of freedom of expression: *R. v. Banville* (1983), 3 C.C.C. (3d) 312 (N.B.Q.B.).

[95] If the application for a publication ban is made after this time, in the course of the preliminary inquiry, the justice has a discretion whether or not to make the order: *R. v. Harrison* (1984), 14 C.C.C. (3d) 549 (Que. Ct. Sess.).

> (3) Every one who fails to comply with an order made pursuant to subsection (1) is guilty of an offence punishable on summary conviction.[96]
>
> (4) In this section, "newspaper" has the same meaning as in section 297.

[91] Again, this ban is mandatory only on the application of the accused.

(iii) identity of complainant or witness

[92] Section 486 of the *Criminal Code* provides as follows:[97]

> (3) Subject to subsection (4), the presiding judge or justice may make an order directing that the identity of a complainant or witness and any information that could disclose the identity of the complainant or witness shall not be published in any document or broadcast in any way, when an accused is charged with
>
> (a) any of the following offences:
>
> (i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 170, 171, 172, 173, 210, 211, 212, 213, 271, 272, 273, 346 or 347 . . . .
>
> (3.1) An order made under subsection (3) does not apply in respect of the disclosure of information in the course of the administration of justice where it is not the purpose of the disclosure to make the information known in the community.
>
> (4) The presiding judge or justice shall,
>
> (a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the complainant to proceedings in respect of an offence mentioned in subsection (3) of the right to make an application for an order under subsection (3); and
>
> (b) on application made by the complainant, the prosecutor or any such witness, make an order under that subsection ....
>
> (5) Every person who fails to comply with an order made under subsection (3) ... is guilty of an offence punishable on summary conviction.

[93] As s. 486(4)(b) indicates, the ban is mandatory only on the application of the complainant, Crown, or witness under age 18.

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[96] Note that this offence provision lacks the "without lawful excuse" provision found in s. 517(2).

[97] These provisions have been held to be constitutionally valid limitations of freedom of the press: *Cdn. Newspa*, *supra* note 14; *R. v. Southam Inc.* (1989), 47 C.C.C. (3d) 21 (Ont. C.A.).

c. Presumptively mandatory publication bans

[94] Under s. 276.3(1) of the *Criminal Code*, a ban applies, without the need for an application, to the contents of an application (paragraph (a)); to evidence, information, and representations provided in an application (paragraph (b)); to a decision under s. 276.1(4) (paragraph (c)); and to a determination under s. 276.2 (paragraph (d)). Pursuant to paragraph (c), however, a judge may permit publication, "after taking into account the complainant's right of privacy and the interests of justice;" and pursuant to paragraph (d), a judge may permit publication if the evidence is admissible, again "after taking into account the complainant's right of privacy and the interests of justice."

[95] Similarly, under s. 278.9(1), a ban applies, without the need for an application, to the contents of an application (paragraph (a)); to evidence, information, and representations provided in an application (paragraph (b)); and to a determination under ss. 278.5(1) or 278.7(1) (paragraph (c)). Pursuant to paragraph (c), however, a judge may permit publication of a determination, "after taking into account the complainant's right of privacy and the interests of justice."

[96] One might describe these provisions as establishing "presumptively mandatory bans;" a ban is mandatory, unless the judge determines that it is not.

[97] Subparagraph 276.3(d)(ii) and s. 278.9(1)(c) do involve an exercise of discretion by a judge – not to limit information access, but to allow it. Because of the uniqueness of this sort of discretion, and because there is no mention of an application but only of the judge making a decision, it is not obvious that the *Dagenais* procedural guidelines should apply. The judge may be perfectly capable of making the determination by himself or herself. Whether any parties, such as the media, should be invited to make representations could remain within the judge's discretion.

d. Discretionary on application provisions

[98] "Discretionary on application" publication bans require an application to be made and the granting of the ban lies within the discretion of the judge who hears the application. Some examples are as follows:

(i) judicial interim release

[99] If the Crown seeks a publication ban under s. 517(1), the judge has the discretion to grant the ban or not.

(ii) preliminary inquiries

[100] Similarly, if the Crown seeks a publication ban under s. 539(1), the judge has the discretion to grant the ban or not.

(iii) identity

[101] In theory, an accused might apply for a publication ban respecting the identity of a complainant or witness under s. 486(3); in this case, the ban would not be mandatory under s. 486(4).

[102] An elaborate statutory discretionary publication ban regime has been established under s. 486 respecting the identities of certain individuals in specified types of cases:

> (4.1) A judge or justice may, in any proceedings against an accused other than in respect of an offence set out in subsection (3), make an order directing that the identity of a victim or witness – or, in the case of an offence in subsection (4.11), the identity of a justice system participant who is involved in the proceedings – or any information that could disclose their identity, shall not be published in any document or broadcast in any way, if the judge or justice is satisfied that the order is necessary for the proper administration of justice.
>
> (4.11) The offences for the purposes of subsection (4.1) are
>
> (a) a criminal organization offence;
>
> (b) a terrorism offence;
>
> (c) an offence under subsection 16(1) or (2), 17(1), 19(1), 20(1) or 22(1) of the *Security of Information Act*; and
>
> (d) an offence under subsection 21(1) or section 23 of the Security of Information Act that is committed in relation to an offence referred to in paragraph (c).
>
> (4.2) An order made under subsection (4.1) does not apply in respect of the disclosure of information in the course of the administration of justice if it is not the purpose of the disclosure to make the information known in the community.
>
> (4.3) An order under subsection (4.1) may be made on the application of the prosecutor, a victim or a witness. The application must be made to the presiding judge or justice or, if the judge or justice has not been determined, to a judge of a superior court of

criminal jurisdiction in the judicial district where the proceedings will take place.

(4.4) The application must be in writing and set out the grounds on which the applicant relies to establish that the order is necessary for the proper administration of justice.

(4.5) The applicant shall provide notice of the application to the prosecutor, the accused and any other person affected by the order that the judge or justice specifies.

(4.6) The judge or justice may hold a hearing to determine whether an order under subsection (4.1) should be made, and the hearing may be in private.

(4.7) In determining whether to make an order under subsection (4.1), the judge or justice shall consider

(a) the right to a fair and public hearing;

(b) whether there is a real and substantial risk that the victim, witness or justice system participant would suffer significant harm if their identity were disclosed;

(c) whether the victim, witness or justice system participant needs the order for their security or to protect them from intimidation or retaliation;

(d) society's interest in encouraging the reporting of offences and the participation of victims, witnesses and justice system participants in the criminal justice process;

(e) whether effective alternatives are available to protect the identity of the victim, witness or justice system participant;

(f) the salutary and deleterious effects of the proposed order;

(g) the impact of the proposed order on the freedom of expression of those affected by it; and

(h) any other factor that the judge or justice considers relevant.

(4.8) An order made under subsection (4.1) may be subject to any conditions that the judge or justice thinks fit.

(4.9) Unless the presiding judge or justice refuses to make an order under subsection (4.1), no person shall publish in any document or broadcast in any way

(a) the contents of an application referred to in subsection (4.3);

(b) any evidence taken, information given, or submissions made at a hearing under subsection (4.6); or

(c) any other information that could identify the person to whom the application relates as a victim, witness or justice system participant in the proceedings.

[103] These applications follow the *Dagenais/Mentuck* model. The substantive grounds for the application are public policy interests, as contemplated by *Mentuck*. The procedural provisions are consistent with *Dagenais*, although the procedural guidance is not exhaustive:

(A) the application must be made to the "presiding judge or justice" or, if not determined, "to a judge of a superior court of criminal jurisdiction in the judicial district where the proceedings will take place": this matches the Dagenais advice.

(B) the application may be made by the Crown, a victim, or a witness.

(C) while the provisions do not establish the form of the application materials, they do require that the application be in writing and set out the grounds for issuing the ban.

(D) notice must be provided to the other parties "and any other person affected by the order that the judge or justice specifies" – however:

(1) the notice period is not specified;

(2) the media are not expressly mentioned as respondents, but the media could be determined to fall within the scope of "persons affected" by the order.

D. Applications to Which the *Dagenais* Procedural Standards May Apply

[104] The *Dagenais* procedural approach is irrelevant to mandatory *in camera* orders or mandatory (whether *per se* or mandatory on application) publication bans. The *Dagenais* procedural approach should not be adopted for sealing orders respecting investigatory records. It should not be adopted for "presumptively mandatory publication bans" in sexual offence cases. It may or may not be adopted for court or review board hearings under Part XX.1 of the *Criminal Code*.

[105] The following types of applications are candidates for the application of *Dagenais* procedural standards, and for further procedural refinement through provincial rules of court:

1. "*in camera*" applications under s. 486(1);
2. sealing orders, respecting court exhibits or entire court files;
3. inherent jurisdiction publication bans;

4. discretionary statutory publication bans,[98] respecting
   (a) judicial interim release hearings (on prosecutorial application),[99]
   (b) the identities of certain persons, under ss. 486(3) or 486(4.1), or
   (c) investigative hearings.

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[98] In *Dagenais*, *supra* note 15, Lamer C.J.C. deals with both statutory and inherent jurisdiction discretionary publication bans together as "discretionary publication bans."

[99] Since Queen's Bench justices do not preside over preliminary inquiries, publication bans respecting these proceedings need not be covered by the Court of Queen's Bench Rules of Court.

CHAPTER 4. EXISTING OFFICIAL PROCEDURES

[106] To date, Nova Scotia and Alberta are the only jurisdictions that have created "official procedures" in response to *Dagenais*.[100]

A. Nova Scotia

[107] Nova Scotia does not have rules of court respecting publication bans in criminal cases.

[108] The Media-Courts Liaison Committee, comprised of judges of various levels of court and journalists in Halifax Regional Municipality, devised an electronic notice regime respecting publication bans.[101] This commenced as a pilot project on March 5, 2001. The regime has six main elements:

(1) An applicant for a publication ban is directed to give timely notice to members of the media.

(2) Notice may be provided in the traditional manner, through service of "hard copies".

(3) Applicants have the option of filing the notice electronically. The notice, once entered, is sent to website subscribers (there is no subscription fee).

(4) Media outlets have the responsibility of subscribing to the electronic notice service. Subscription entails deemed acceptance of electronic service.

(5) Only service is accomplished electronically; the application is heard in the ordinary manner in court.

(6) The project only concerns discretionary or common law publication bans, not mandatory bans.

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[100] This is noted in *Re Tran*, [2004] B.C.J. No. 1212 at para. 8 (S.C.), Allan J. The Quebec Superior Court does have a rule imposing a publication ban respecting pre-trial hearing conferences: *Rules of Practice of the Superior Court of Quebec - Criminal Division (Section 482 of the Criminal Code)*, s. 40, online: <http://www.tribunaux.qc.ca/mjq_en/c-superieure/regle-pratique/criminelle/criminelle2002/index-regles482.html>.

[101] See the courts of Nova Scotia, *Civil Procedure Rules*: online: <http://www.courts.ns.ca/General/bar.htm> and <http://www.nsbs.ns.ca/notices/publication_ban_pilot.htm>; See also Dean Jobb, "Fighting Publication Bans," online: The Canadian Association of Journalists – Media Magazine <http://www.caj.ca/mediamag/winter2002/legal.html>; and Dean Jobb, "Notes on Publication Ban Notices" (October 2001) Canadian Lawyer 20.

[109] The pilot project procedure has been employed in a number of cases, including *Prosper*,[102] *Rhyno*,[103] and *M.C.R.*[104]

B. Alberta

[110] The situation in Alberta is evolving. Until very recently, the only official procedures governing non-disclosure orders in criminal matters were set out in a Court of Queen's Bench practice note and a Notice to the Profession. In March, 2004, the Provincial Court established a practice note and pilot project for Edmonton. In June 2004, the Court of Queen's Bench approved a practice note applicable to civil matters. Work is currently underway by the Court of Queen's Bench to develop a new practice note to replace the current criminal practice note.

1. Practice Note '4' and the Notice to the Profession

[111] The Alberta Court of Queen's Bench established publication ban procedures for criminal cases through "Q.B. Practice Note '4'" (January 1, 1997) [CPN4] and a "Notice to the Profession" (originally dated November 4, 2001). CPN4 provides as follows:

> **EXPLANATORY NOTE**: Publication Bans should be dealt with by the enactment of rules pursuant to the *Criminal Code*. However, for an interim period, applications for publication bans shall be administered by way of this practice note.
>
> 1. The Rules enacted shall apply only to an application for a ban on publication made pursuant to a judge's common law or legislated discretionary authority ("Application"). In this Practice Note and any subsequent rules a 'judge' is a member of the Court of Queen's Bench of Alberta.
> 2. No application shall be brought more than 21 clear days prior to the commencement of a trial, without leave of a judge.
> 3. The application shall be made to the judge assigned to hear the case. If the judge is unknown, the application shall be made before any judge of the Court in the Judicial District where the matter is scheduled to be heard.

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[102] *R. v. Prosper* (2001), 200 N.S.R. (2d) 65, 2001 NSPC 33 at para. 14, Curran J.P.C. [only one media outlet responded, and consented to the ban].

[103] *R. v. Rhyno*, 2001 NSPC 9 [notice given; media outlets opposed application; ban denied].

[104] *R. v. M.C.R.*, [2004] N.S.J. No. 28 (S.C.), Gruchy J. [on transfer to adult court, young offender legislation ban terminates; notice given to media; publication ban continued in adult proceedings].

4. (a) The applicant bears the onus of ensuring that proper written notice of the application is given to those affected by it.
   (b) Notice will include the applicant posting a notice of the intended application for a publication ban in a place reserved for that purpose at the court house where the application is to be heard no less than 14 clear days before the application.
5. Parties claiming an interest in the proceedings may apply to the Court for standing on the hearing date.
6. Counsel may make an ex parte application to the Chief Justice or his or her designate for further directions as to the parties to be served and the manner of service.
7. Three copies of the notice of application shall be filed with the Clerk of the Court. The Clerk will make a copy available to media outlets on request.

[112] The Notice to the Profession currently provides as follows:

> In an effort to ensure compliance by the media with Publication Bans and other orders made by Judges of the Court of Queen's Bench, effective January 1, 2002, applications for Publication Bans and similar orders shall be accompanied by a written Notification to Media using the attached form. Once the order is granted, the document will be signed by the Judge and placed on the Clerk's file. Throughout the course of the trial or other proceeding, the journalists will be given access to the Notification to ensure that the nature and extent of the order is understood.
>
> Counsel are reminded of the requirements of Criminal Practice Note No. 4 when applying for publication bans made pursuant to a Judge's common law or legislated discretionary authority.[105]

[113] This Notice would apply not only to discretionary publication bans, but to mandatory on application bans.

2. Provincial Court practice note

[114] On March 2, 2004, Chief Judge Walter of the Provincial Court of Alberta signed a Notice to the Profession establishing a practice note for publication ban and other non-disclosure order applications in the Criminal Division of the Provincial Court of Alberta, applicable in Edmonton only [PCNTP]. The PCNTP initiated a pilot project,

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[105] Consolidated Notices to the Profession, E (General), no. 4, online: <http://www.albertacourts.ab.ca/qb/notices/ConsolidatedNoticestotheProfessionSept2004.pdf>. The form referred to in the Notice was recently revised, and follows the notice in the Consolidated Notices as item 5.

designed to determine whether the approach it takes should be maintained and expanded to the entire Province. The procedures set out in the PCNTP are likely to be extended to the rest of the Province soon. The PCNTP, the webpage describing the procedure, and the Notice of Application form are attached as Schedule A.

3. Court of Queen's Bench practice note – civil matters

[115] In June, 2004, the Court of Queen's Bench approved a civil practice note concerning procedures for publication bans and other non-disclosure orders in civil matters, which is now Civil Practice Note 12, effective September 1, 2004 [Civil PN].[106] The Civil PN and its Notice of Application form are attached as Schedule B.

C. The Alberta "Official Procedures": Comparison and Contrast

1. Similarities

[116] The PCNTP and the Civil PN have some significant similarities. In these, both differ from CPN4.

a. Application

[117] CPN4 applies only to publication ban applications. Both the PCNTP and the Civil PN apply to non-disclosure order applications generally – including, but not limited to, publication ban applications. They apply to applications for common law or statutory discretionary

(i) publication bans,

(ii) sealing orders, including orders restricting access to or copying of exhibits (the PCNTP excludes investigatory sealing orders, which would not be a concern under the Civil PN, save, perhaps, in *Anton Pillar* contexts),

(iii) orders allowing the use of pseudonyms,

(iv) *in camera* orders, and

(v) orders permitting witnesses to testify in a manner preventing their identification: PCNTP s. 2; Civil PN s. 1.

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[106] Online: <http://www.albertacourts.ab.ca/qb/practicenotes/civil/pn12.pdf> and <http://www.albertacourts.ab.ca/qb/practicenotes/civil/pn12FormA.pdf>.

[118] The PCNTP scope of application may be broader than the Civil PN's; the PCNTP uses "inclusive" language, whereas the Civil PN lists the types of applications to which it applies.

b. "Motions court"

[119] CPN4 provides that the application is to be made before the judge assigned to hear the case; or, if unknown, before any Queen's Bench judge in the Judicial District where the matter is to be heard.

[120] The PCNTP and the Civil PN also begin with the application being brought before the judge assigned to hear the case; if unknown or unavailable, the application must be made before the case management judge; if none, before (respectively) the Chief Judge or Justice, the Assistant Chief Judge or Justice, or designate: PCNTP s. 7, Civil PN s. 4.

c. Form of notice

[121] CPN4 does not specify a form of notice for the application. The PCNTP and Civil PN do. Both forms contain, generally, the type of information required for a civil notice of motion. The PCNTP form, however, does not require reference to the evidence, rules, or statutory provisions to be relied on. This form, however, must provide "a description sufficient to provide recipients of the notice with an understanding of the nature of the intended application:" s. 6.

[122] The PCNTP form is a simpler document than the Civil PN form. It is set up in with "fields" to be filled in. It is designed to be completed on-line; once submitted, it is transmitted electronically to interested parties (more on this below). It appears that this form could be printed and used by the applicant as its hard-copy written notice of application.

[123] The current Civil PN form is more like a standard notice of motion.

d. Timing

[124] CPN4 provides that "no application shall be brought more than 21 clear days prior to the commencement of a trial," without leave: s. 2; and notice of an application

must be posted at the appropriate location "no less than 14 clear days before the application:" s. 4(b).

[125] Both the PCNTP and the Civil PN require at least 2 clear days notice of the application, before trial: PCNTP s. 6, Civil PN s. 3(a) ("before the beginning of the trial, application, proceeding, or matter that the ban or order is to refer to").

e. Preservation of discretion

[126] While both the PCNTP and the Civil PN contemplate that the media should ordinarily be notified of applications in a prescribed manner (more on this below), both also expressly preserve the discretion of the court respecting notice to interested parties and the mode of notice.

f. Sealing whole files

[127] The PCNTP and the Civil PN both contain provisions respecting "Sealing/Unsealing Court Files." The language is the same, save for the Judge/Justice references:

> An application to seal the entire court file, or an application to set aside a sealing order, must be made to the Chief Judge[/Justice], the Assistant Chief Judge [/Justice], or their respective designate, who may make such directions as to the parties to be served, the time for and the manner of service of notice which, in their discretion, they determine to be appropriate: PCNTP s. 12, Civil PN, last section.

g. Electronic notice

[128] The PCNTP embraces an electronic notice procedure, which will be described below. Like the CPN4, the Civil PN currently concerns only hard-copy notice, "pending the implementation of an electronic form of notice:" Civil PN s. 3(b).

h. Orders on files

[129] The PCNTP and the Civil PN are alike in an omission. Neither refers to a form of notification of order placed on the court file to ensure that the media understand the nature and extent of a non-disclosure order. This form of notification is established in the Notice to the Profession.

[130] The Notice to the Profession is not limited to criminal matters, so it may not have been necessary for the Civil PN to deal with this issue (although a cross-reference or a consolidation of the provisions might have been useful).

2. Differences

a. Consequences

[131] The PCNTP does not refer to the consequences of violating its provisions. The Civil PN does in s. 8:

> If satisfied that there has been a failure to comply with the requirements of this Practice Note, the Court, on application or on its motion, may:
>
> (a) make any of the orders provided in Rule 599.1 or 704(1)(d);
>
> (b) require the party or counsel representing the party, or both, to pay the reasonable expenses incurred because of any noncompliance with this Practice Note, including counsel's fees;
>
> (c) make any other appropriate order.

[132] Rule 599.1 of the Alberta Rules of Court provides as follows:

> (1) Notwithstanding anything in this Part, where
>
> (a) a party to an action, a counsel acting in respect of an action or any other person who is involved in an action fails, without an excuse or an explanation that in the opinion of the Court is appropriate, to comply with these Rules or a Practice Note of the Court, and
>
> (b) that failure to comply, in the opinion of the Court, has interfered with or may interfere with the proper or efficient administration of justice,
>
> the Court may order that party, counsel or other person to pay to the clerk a penalty in the form of costs as determined by the Court.
>
> (2) In making an order under subrule (1), the Court may do one or more of the following:
>
> (a) determine the amount of the costs;
>
> (b) prescribe the time within which the costs are to be paid;
>
> (c) prescribe terms or conditions with respect to the payment of the costs or any other matter respecting the making of the order.
>
> (3) Without restricting the amount of costs that may be imposed under subrule (1), the Court in determining the amount of the costs to be imposed may take into consideration the amount of costs set out in Schedule C.
>
> (4) Once costs are ordered to be paid under this Rule, those costs are payable by the person on whom the costs were imposed

> (a) whether or not any settlement was made in respect of the actions, and
> (b) notwithstanding any agreement between the parties to the action or their counsel.

[133] The Rule 599.1 sanctions apply to failures to comply with practice notes – hence the appropriateness of the reference to Rule 599.1 in the Civil PN.

[134] The costs sanction may not be appropriate in a criminal context.

[135] Rule 704(1)(d) of the Alberta Rules of Court presupposes a finding of civil contempt. It provides as follows:

> Every person in civil contempt is liable to any one or more of the following:
>
> (d) if a party to an action or proceeding
>
> (i) to have his pleadings or part thereof struck out;
> (ii) to have his action or proceeding stayed;
> (iii) to have his action dismissed or judgment entered against him;
> (iv) to be prohibited from introducing in evidence designated documents, or things or testimony.

[136] These are appropriate remedies in a civil context, but not in a criminal context.

b. Interim non-disclosure

[137] Section 7 of the Civil PN deals with the problem of disclosure before the application is heard: "The information that is the subject of the initial application may not be published without leave of the court until the application is heard." The Notice of Application form also confirms this. The PCNTP does not address this point.

c. Interested parties

[138] The Civil PN and the PCNTP take somewhat different approaches to designating "interested parties."

[139] The Civil PN approach, in s. 2, is straightforward. "Interested parties" includes

(i) the parties,
(ii) the electronic and print media, and
(iii) any person named by the court.

[140] Under s. 6, "[a]ny party not referred to in para. 2 above and claiming an interest in the proceedings must apply to the Court for standing to be heard at the application."

[141] The PCNTP also provides that "interested parties" includes the parties (s. 4), and allows that "[o]n application to the Court, any other person may be named an interested party:" s. 5. In s. 11, the PCNTP also provides that "[a]ny person or entity who is not a party to the proceedings and who claims an interest in the proceedings must apply to the Court for standing to be heard at the application."

[142] The Civil PN s. 7 and the PCNTP s. 11 are improvements over CPN4, s. 5: "Parties claiming an interest in the proceedings may apply to the court for standing on the hearing date." The CPN4 provision delays the standing application to the hearing date, with the potential of delaying the non-disclosure application until standing is resolved. The PCNTP and the Civil PN allow standing issues to be determined before the hearing proper.

[143] With respect to the media, the PCNTP s. 4 provisions concerning "Interested Parties" provide that "[a]ny electronic or print media representative who wishes to receive notice pursuant to this Practice Note may register as an 'interested party.'"

[144] Under the Civil PN approach, the media are automatically interested parties.

[145] Under the PCNTP approach, the media may become interested parties through registration. Otherwise, media outlets must apply under s. 5 to be named interested parties, or must apply under s. 11 to participate in the application.

d. Electronic notice: the Provincial Court model

[146] The PCNTP establishes an electronic notice mechanism with the following features:

(i) Electronic service does not replace traditional hard-copy notification – posting still occurs at the appropriate location at the Law Courts Building.

(ii) The host for the mechanism is the Alberta Courts website (not, as in Nova Scotia, a website maintained by a third party). Access to the notification processes is through the Provincial Court - Criminal part of this website: s. 9(a).

(iii) Media outlets are entitled to register as interested parties, and receive electronic notice:

(A) Media outlets, however, do not register directly. Instead, each must "name a member of the Law Society of Alberta to receive notice on behalf of the media representative," and must provide the e-mail address for this member. Notice is provided to this e-mail address: ss. 4(a) and (b).

(B) Access to the website is password protected: s. 10.

(C) Passwords are issued "in the manner directed by the Chief Judge or [his or her] designate:" s. 10.

(iv) Providing notice is the responsibility of the applicant: s. 6.

(A) The applicant must fill out the on-line form and submit it: s. 9(a).

(B) The form, then, is broadcast to the lawyer-representative registrants.

(v) If the website is not accessible (e.g., the server goes down), "notice must be given by e-mail or fax to media who have provided a fax number or an e-mail address to the Clerk of the Court for the purpose of receiving such notice:" s. 9(a).

CHAPTER 5. DISCUSSION OF ISSUES: COURT OF QUEEN'S BENCH

[147] This Chapter shall address only issues relating to Court of Queen's Bench procedures. The next Chapter shall address issues relating to Court of Appeal procedures.

ISSUE No. 1
In the present circumstances, should reform efforts respecting procedures for non-disclosure orders be put on hold?

[148] If, as was the case only a few months ago, CPN4 and the Notice to the Profession were the sole official directives in the non-disclosure area, further reform would be warranted, as CPN4 itself indicates: "Publication Bans should be dealt with by the enactment of rules pursuant to the *Criminal Code*. However, for an interim period, applications for publication bans shall be administered by way of this practice note."

[149] But given the new PCNTP, the Civil PN, and the Court of Queen's Bench initiative to update CPN4, would the best policy be to hold off on comment for now, accumulate experience with the new approaches, and only then offer comment, based on that experience?

CRIMINAL RULES WORKING COMMITTEE PROPOSAL

[150] In the Committee's view, further reform efforts remain warranted at this time. First, new criminal procedures have not yet been developed; CPN4 is still in effect. The consultation process connected with this memorandum could help inform the Queen's Bench reform processes. The time for criminal procedural reform has not passed. Second, the PCNTP and the Civil PN are practice notes. From the standpoint of Queen's Bench practice, it may be preferable for certain matters addressed in practice notes to be addressed instead in rules of court. Third, the PCNTP and the Civil PN, while similar, are not the same. Some practical and policy choices remain to be made. Uniformity, of course, is always desirable; and the consultation and recommendation process could assist in promoting uniformity.

ISSUE No. 2
If additional procedural rules are necessary, in what form should they be established?

[151] If additional procedural rules are necessary, such rules could be established in

(a) statute;
(b) federal regulation;
(c) federal uniform rules of court;
(d) rules of court; or
(e) practice notes or notices to the profession.

[152] Statute is a potential home for procedural rules, even in the publication ban context – witness the rules for s. 486(4.1) bans. In its 1996 report, the Publication Bans Committee of the Criminal Law section of the Uniform Law Conference of Canada did suggest that additional procedural rules for publication bans were necessary, but that these rules should be established in statute.[107] The report, however, did not discuss the merits and demerits of various vehicles for the delivery of procedural rules.

[153] Procedural rules could be established in federal regulation. Regulation often establishes procedures for administrative or non-judicial tribunals.

[154] Under s. 482(5) of the *Criminal Code*, the Governor in Council is entitled to make uniform rules, which would have the virtue (if no other) of uniformity.

[155] The current Alberta procedures are set out in practice notes.

CRIMINAL RULES WORKING COMMITTEE PROPOSAL

[156] In the Committee's view, statute is not an appropriate home for procedures governing non-disclosure orders. To the greatest degree practically possible, procedures should be established in rules of court.

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[107] ULCC, *supra* note 38.

[157] Statute (and this would be federal legislation) is not an appropriate home for procedural rules, because

(i) statutory provisions are likely to lack the specificity required for procedural rules;

(ii) while statutory provisions provide uniformity, uniformity may not fit with local practice and procedures;

(iii) statutory provisions are relatively inflexible, so that unintended consequences, clumsiness, and gaps cannot be expeditiously fixed;

(iv) a substantial wait would doubtless be required before statutory provisions were enacted; and

(v) while Parliamentarians have policy expertise, their expertise is not likely to extend to procedural matters; procedural expertise resides with the judiciary and the bar.

[158] Given Parliament's failure to create procedural rules for non-s. 486(4.1) publication bans, Parliament may have demonstrated its disinclination to legislate in this area, or perhaps its judgment that legislation in this area would not be appropriate.

[159] In the criminal procedure context, federal regulation would suffer from the same sorts of weaknesses as federal legislation.

[160] Uniform rules of court would suffer from the same sorts of weaknesses as legislation and regulation.

[161] Practice notes do have the virtues of ease of creation and amendment. These virtues, however, may induce vices: Practice notes can be difficult to locate (not being integrated with general rules). Because they may be changed rapidly, counsel run the risk of having their knowledge rapidly rendered obsolete. Practice and strategy based on a set of directives may be thwarted by changes. Moreover, the area is beset by issues concerning the persons entitled to issue practice notes, the proper subjects of practice notes (as opposed to rules of court or legislation), and the legal effects of practice notes.[108] Hence, while practice notes have a proper role in the administration

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[108] "A practice directive does not have the force of law:" *R.* v. *Sharpe* (1999), 181 D.L.R. (4th) 246 at

(continued...)

of litigation, they are not the happiest home for directives concerning non-disclosure orders.

[162] CPN4 stated that Publication Bans should be dealt with by the enactment of rules pursuant to the *Criminal Code*. Lamer C.J.C. suggested that rules of court are the best home for publication ban provisions: "Given that I have concluded that motions for publication bans made in the context of criminal proceedings are criminal in nature, the solution to these practical problems is to be found in the provincial rules of criminal procedure and the relevant case law."[109]

[163] If only because of the defects of the other options, directives concerning non-disclosure orders would be best located in our rules of court.

ISSUE No. 3
Should new rules apply to all forms of non-disclosure orders?

[164] CPN4 applies only to publication bans. The PCNTP and the Civil PN apply to non-disclosure orders more generally. Which approach is preferable?

CRIMINAL RULES WORKING COMMITTEE PROPOSAL

[165] In the Committee's view, the inclusive approach taken by the PCNTP and the Civil PN is preferable to a focus on publication bans alone. The issues at stake in all of the applications drawing on discretionary authority are the same: how should the interests supporting openness or disclosure be balanced against the interests supporting restrictions on access or non-disclosure? All of the applications will involve balancing either *Charter* rights to freedom of expression and freedom of the press as against *Charter* rights to a fair trial or state or public interests, or *Charter*

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[108] (...continued)
para. 12 (B.C.C.A.), Finch J.A. Also consider the following: "In practice, says Edmonton media lawyer Barry Zalmanowitz, notice still tends to be an ad hoc affair. Judges advise counsel who fail to comply with the deadlines 'to try and give some kind of notice. Nobody has been refused a publication ban or has been rebuked by the court for not complying with the practice note,' notes Zalmanowitz . . . . 'A practice note is a start, but practice notes don't have the force of law – they're informal statements of the procedures that should be followed:'" Dean Jobb, "Fighting Publication Bans" and "Notes on Publication Ban Notices," *supra* note 101 at 23.

[109] *Dagenais*, *supra* note 15 at para. 49.

rights to freedom of expression and the press and rights to a fair trial as against state or public interests. If the issues are the same, the procedures for litigating those issues should be the same.

[166] But while inclusiveness is preferred, new rules should not apply to all types of non-disclosure orders. The rules should apply only to discretionary orders, whether the source of the discretion is inherent jurisdiction or statute (the PCNTP and the Civil PN have this restriction). Mandatory rules do not require application procedures. New rules should not apply to sealing orders respecting investigatory records, or to "presumptively mandatory publication bans" in sexual offence cases. These two procedures are sufficiently unique, serving specific and precise objectives, in contexts in which the ordinary interest in openness is either trumped or attenuated, so that they should not be subject to a general procedural regime. The same could also be said of disposition hearings under Part XX.1 of the *Criminal Code*.

[167] New rules could apply to the following types of applications (this list matches the PCNTP and Civil PN lists):

(a) "*in camera*" applications under s. 486(1);
(b) sealing orders, respecting court exhibits or entire court files;
(c) inherent jurisdiction publication bans;
(d) discretionary statutory publication bans, respecting
    (i) judicial interim release hearings (on prosecutorial application),
    (ii) the identities of certain persons, under ss. 486(3) or 486(4.1), or
    (iii) investigative hearings.

[168] Both the PCNTP and the Civil PN provide separate treatment for applications to seal entire court files. A special process is established. The application is made to the Chief, Assistant Chief, or designate, who makes directions concerning the parties to be served and the mode and timing of service.

[169] The differences in principle between sealing parts of a court record and an entire file are not obvious; in the absence of a distinction in principle, the Committee's view is that there is no need for special treatment for sealing entire court files. Insofar as special circumstances do obtain, the rules would permit applications for customized procedures.

[170] Again in relation to sealing orders, both the PCNTP and the Civil PN provide separate treatment for applications to set aside sealing orders. And again, the application is made to the Chief, Assistant Chief, or designate, who makes directions concerning the parties to be served and the mode and timing of service. Since the applicants would typically be media organizations, and since the need for media notice would therefore be at least attenuated, establishing one set of procedures for both applications for sealing orders and applications to set aside sealing orders would be clumsy if not confusing. In the case of applications to set aside sealing orders, as opposed to applications for sealing orders, separate and special treatment in the rules is justified.

ISSUE No. 4
Which judges should be entitled to hear non-disclosure order applications?

[171] CPN4 and the PCNTP and the Civil PN agree that, as a first step, the application should be made before the judge assigned to hear the case. If that judge is unknown or unavailable, CPN4 allows the application to be heard by "any judge of the Court in the Judicial District where the matter is to be heard." The PCNTP and Civil PN position is more restrictive: the application must be made before the case management judge; if none, before (respectively) the Chief Judge or Justice, the Assistant Chief Judge or Justice, or designate. Which approach is preferable?

CRIMINAL RULES WORKING COMMITTEE PROPOSAL

[172] The Committee proposes that new rules expressly qualify the judicial designation provisions as being "subject to any legislative provision to the contrary." This qualification goes without saying, but the reminder is not harmful. Subsection 486(4.3) of the *Criminal Code*, for example, provides that the application "must be made to the presiding judge or justice or, if the judge or justice has not been determined, to a judge of a superior court of criminal jurisdiction in the judicial district where the proceedings will take place." No mention is made of a case-management judge or the Chief Justice. Although the Committee recognizes that the PCNTP and Civil PN approach does speak to a certain consensus, it might be argued that the PCNTP restriction is inconsistent with s. 486(4.3), and therefore impermissible under s. 482(1)) – an applicant may desire to apply to a Queen's Bench

judge, without regard to whether he or she is a case-management judge or a designate of the Chief or Associate Chief Justice.

[173] The Committee also notes that the CPN4 (and s. 486(4.3)) approach is consistent with Lamer C.J.C.'s comments about the appropriate hearing judge in *Dagenais*.

[174] The Committee is not aware of any severe problems that would be occasioned by allowing applications to be made (as a last resort) to any Queen's Bench justice in the Judicial District where the proceedings will take place.

ISSUE No. 5
Should new rules specify notice application forms?

[175] The PCNTP and the Civil PN establish application forms. Should forms be specified by the rules, or should the drafting be left up to counsel?

Criminal Rules Working Committee Proposal

[176] Standard forms have the virtues of standardizing the information provided, and ensuring that the media have adequate notice of the case to meet. In the Committee's view, the specification of application forms is preferable.

ISSUE No. 6
What notice period should apply to applications for non-disclosure orders?

[177] The CPN4 provides that "no application shall be brought more than 21 clear days prior to the commencement of a trial," without leave (s. 2); and notice of an application must be posted at the appropriate location "no less than 14 clear days before the application" (s. 4(b)). Preliminary indications are that this notice period is not followed in practice.

[178] Both the PCNTP and the Civil PN require at least 2 clear days notice of the application, at least 2 clear days before trial.

CRIMINAL RULES WORKING COMMITTEE PROPOSAL

[179] In the Committee's view, the PCNTP and Civil PN approach is sound. A notice period close to the trial date is likely to be respected by counsel, since, by this time, counsel are likely to have fully addressed their minds to all trial issues. Counsel will probably not prepare for trial too much in advance of the trial date.

[180] The issues what counts as "days" and "clear days" will be addressed through the general reform of the Alberta Rules of Court.

ISSUE No. 7
Should new rules expressly confirm the discretion of the court respecting notice issues?

[181] The PCNTP and the Civil PN confirm judges' discretion respecting notice matters. Should a new rule follow suit, and expressly confirm this discretion?

CRIMINAL RULES WORKING COMMITTEE PROPOSAL

[182] Judges have this discretion as a matter of law. Lamer C.J.C. confirmed this in *Dagenais*: "Exactly who is to be given notice and how notice is to be given should remain in the discretion of the judge to be exercised in accordance with the provincial rules of criminal procedure and the relevant case law."[110] Preserving discretion is important, so that the judge can deal with special circumstances. In the Committee's view, to avoid any improper *expressio unius* argument ("if a discretion were meant to be preserved, the rules would say so; they don't, so no discretion is preserved"), it would be preferable to confirm the retention of the discretion expressly.

ISSUE No. 8
Should new rules specify the consequences of violating the rules?

[183] The Civil PN specifies consequences for its violation; the PCNTP does not. The Civil PN consequences include an award of costs, the striking out of pleadings, and the stay of an action.

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[110] *Ibid.*

CRIMINAL RULES WORKING COMMITTEE PROPOSAL

[184] The consequences specified by the Civil PN make sense in a civil context, and generally it is worthwhile to specify the consequences of violating rules. Even in criminal cases, costs may be an appropriate remedy in favour of an accused against an offending Crown (e.g. as a s. 24(1) remedy for a *Charter* violation[111]). Specifying an award of costs as a potential response to a violation of criminal rules of court, however, is inadvisable. Costs should not be awarded against accuseds; the Crown should not be exposed to costs liabilities to non-accused third parties; and, in any event, s. 482(3) may not authorize the making of rules supporting awards of costs.[112]

[185] It would not be appropriate in a criminal context simply to give the judge a broad "punitive" power (e.g., "to make any order deemed appropriate in the circumstances"), since this could be interpreted to allow the judge to award costs against an accused or to take more severe action against an accused.

[186] Some "violation" issues in a criminal case are likely to revolve around late notice or inadequate notice of an application. A judge with a confirmed discretion respecting notice issues (see *supra* Issue 7) would have sufficient authority to deal with these matters.

[187] A failure to abide by an order granted under the rules could attract a finding of contempt of court. The availability of this sanction depends on the law of contempt, the discussion of which is outside the scope of this memorandum. This potential penal consequence need not be referred to in new rules.

[188] As will be discussed in connection with the next Issue, however, new rules may provide for an interim non-disclosure obligation. When notice of an application is provided, the interim non-disclosure obligation should be highlighted. The notice could warn recipients that a failure to abide by the non-disclosure obligation may attract a finding of contempt of court.

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[111] See *R. v. Robinson* (1999), 250 A.R. 201 (C.A.); *R. v. Dix* (2000), 259 A.R. 328 (Q.B.), Veit J. and *R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575 at para. 13, respecting awards of costs in criminal cases.

[112] S. 482(3) may not authorize the making of rules permitting costs awards: *Quebec (Attorney General) v. Cronier* (1981), 63 C.C.C. (2d) 437 (Que. C.A.).

ISSUE No. 9
Should new rules provide that the information that is the subject of an application may not be published without leave of the court prior to the application?

[189] The basic problem is this: A non-disclosure order is granted only after a hearing. The materials supporting the granting of the order and evidence tendered in the hearing would not, prior to the granting of the order, be required not to be disclosed. Hence, information derived from the filed materials or the evidence could be published with impunity – the protection sought by the application could be lost through making the application.

[190] Different mechanisms have been used to prevent the premature disclosure of information. One approach, which, it appears, has not found favour with the profession, is for the judge to permit only extremely limited disclosure of information to counsel for the media. The drawback with this approach is that counsel for the media may not have information sufficient to permit them to obtain instructions or to provide a proper argument.

[191] Another approach, which, it appears, has found favour with the profession, is for full disclosure to be provided to counsel for the media, on their undertaking not to disclose the information except for the purposes of obtaining instructions and arguing the motion.

[192] This approach could be coupled with an "interim non-disclosure application," to put a non-disclosure order in place pending the full hearing of the motion, on notice to all interested parties.

[193] The approach adopted by s. 7 of the Civil PN ("The Information that is the subject of the initial application may not be published without leave of the Court until that application is heard") has the same effect as the "undertakings" or the "undertakings plus interim application" approach, but does not require undertakings or an interim application.

CRIMINAL RULES WORKING COMMITTEE PROPOSAL

[194] The Committee proposes that new rules contain an "interim non-disclosure" provision. This sort of provision has the virtue of making interim non-disclosure clear, and brings that rule to the attention of parties.

[195] One qualification is that the provision should allow for "publication" for the purposes of responding to the application, so that (e.g.) counsel could communicate information to their clients, or *vice versa*. Subsections 486(3.1) and (4.2) permit this: "an order . . . does not apply in respect of the disclosure of information in the course of the administration of justice if it is not the purpose of the disclosure to make the information known in the community" (s. (4.2.)).

[196] If an unrepresented party were involved or if a media outlet were directly given notice of an application the provision would bind that party, and any difficulties surrounding the inability of non-lawyers to give undertakings would be avoided.

[197] A difficulty with this approach, however, is that it may involve *ultra vires* rule-making. An argument may be made that a non-disclosure obligation is a "substantive" legal rule, akin to a provision in a protection of privacy statute. It is true that s. 20(1.1) of the *Court of Queen's Bench Act*[113] provides that rules of court may have substantive effect. The *Court of Queen's Bench Act*, however, is a provincial statute. Reliance on this statute runs up against the argument that s. 482 of the *Criminal Code* (which would establish the jurisdiction for the new rules) cannot be used to make rules that grant substantive rights supplemental to those in the *Criminal Code*.[114]

[198] As an alternative, new rules could expressly provide for an application for a discretionary interim non-disclosure order, pending full hearing of the motion. The interim order (if granted) would be communicated to interested parties, along with notice of the application.

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[113] R.S.A. 2000, c. C-31.

[114] *B.C. Tel*, *supra* note 7 at para. 55.

ISSUE No. 10
Should new rules declare that the media are "interested parties?"

[199] Under the Civil PN approach, the media are automatically interested parties. Under the PCNTP approach, the media may become interested parties through registration. Otherwise, media outlets must apply to be named as interested parties, or must apply to participate in the application.

[200] The two approaches would probably not differ much in application. Under the PCNTP approach, most media outlets (at least the major outlets) would register. Any that did not and learned of an application would be entitled to apply for standing.

CRIMINAL RULES WORKING COMMITTEE PROPOSAL

[201] The difficulties are these: The media have an interest in ensuring that openness interests are respected. But there are myriad media organizations – print, radio, television, Internet[115] – and no one organization and no industry association has any inherent or special status as "public interest watchdog." *Dagenais* requires that "the media" be given notice of applications, and that "the media" have standing in applications – but how should notice be given, when is media notice adequate, and which organizations should be granted standing?

[202] The difficulty with the PCNTP approach is that it makes status as an "interested party" dependent on registration, when that status may be the product of law; the difficulty with the Civil PN approach is that it makes all media organizations "interested parties," but would allow for notice to only a subset of these organizations (so that all "interested parties" may not have actual notice of an application).

[203] A slight modification of the PCNTP approach provides a way through these difficulties.

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[115] And not only "major" news organizations, like the CBC, major City daily newspapers, or monthly magazines, but many smaller scale and niche organizations. An issue the Committee did not pursue was whether the proliferation of internet-based news-providers has undermined the practicality of media notification.

[204] The term "interested parties" should be understood as only a classification for the purposes of the rules. This term could embrace the parties to the litigation and any person named by the court as an "interested party." Notice must be given to these parties in accordance with the usual rules.

[205] Instead of designating the media as "interested parties," the rules should simply require notification of the media, through hard-copy or electronic means or both (as discussed in relation to the next two Issues), or as directed by the judge in his or her discretion.

[206] Media organizations that receive notice may then apply at the application for standing, and the particular terms of standing may be determined at the application. Lamer C.J.C. did state in Dagenais that "the judge should give the media standing (if sought);"[116] but he also indicated that "[i]f the media wish to oppose a motion for a ban . . . they should attend at the hearing on the motion, argue to be given status, and if given status, participate in the motion."[117] Based on the actual media attendances, the judge can sort out which organizations (if not all) should be given standing, and the degree of participation that those organizations should be permitted.

ISSUE No. 11
Should new rules retain the current technique of hard-copy notification through posting at a specified location?

[207] The PCNTP and the Civil PN contemplate the retention of hard-copy notification. Should this technique be retained?

CRIMINAL RULES WORKING COMMITTEE PROPOSAL

[208] There does not seem to be a good reason to dispense with the hard-copy form of notice. Its continued use prevents a media outlet that has not availed itself of electronic notice facilities from complaining of a lack of notice – notice will remain available, as it had been (at least as it had been respecting publication bans). The

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[116] *Dagenais*, *supra* note 15 at para. 98(a); see also para. 58.

[117] *Ibid.* at para. 56.

Committee proposes the retention of hard-copy posted notification of applications for non-disclosure orders.

ISSUE No. 12
Should new rules provide for electronic notice of applications for non-disclosure orders?

[209] All sides agree that some form of electronic notification for the media is desirable. How should this be accomplished, from a drafting perspective and from a technological perspective?

CRIMINAL RULES WORKING COMMITTEE PROPOSAL

[210] A distinction should be drawn between a requirement to provide electronic notice to the media and the particular technological means used to provide electronic notice to the media.

[211] The Committee's view is that the requirement to provide electronic, computer-based notice to the media, in the prescribed form with the prescribed information, should be set out in new rules. This sort of rule, along with the hard-copy notification provision, would establish an adequate framework for notice to the media in ordinary cases. In unusual cases, an application for directions could be made.

[212] The particular manner of giving notice, which will depend on the particular technological solutions relied upon, should not be detailed in the rules. Technology, website design, and even web addresses are likely to evolve, as will techniques of giving notice; and experience with particular technologies and techniques is likely to suggest change. Changes in rules or interpretations of rules surrounding privacy protection and security for personal information could require modifications of process. The more flexible and expeditious practice note procedure would be the most practical home for detailed procedures that will likely undergo change over the short- to mid-term.

[213] The bridge between the new rules and a practice note should be a provision in the rules authorizing the Chief Justice to permit electronic notice in a manner to be specified by him or her.

[214] The Committee does not make any proposal respecting the preferable method of providing electronic notice, but it does observe that consistency in modes of notification across the provincial justice system would be desirable.

[215] The Committee observes that the Provincial Court web-based model is at least one reasonable way to provide notice. The host website is maintained by government, and not (as in Nova Scotia) by a private third party. This helps maintain the integrity of the system, both technologically and from the standpoint of administration of justice.

[216] The Provincial Court model does not appear to be too expensive from a governmental perspective. The host website is used for other purposes. The duties of the webmaster will increase only marginally. The expense of creating a brand new, independent site is avoided. The process does not involve much Court House staff involvement. Applicants, not court staff, input the electronic information. Non-disclosure applications are not plentiful. Hence, even if there are "bugs in the system" or if problems can be expected in some percentage of uses, the absolute number of difficulties is not likely to be large. The cost of software and website design to support the notification process would have to be absorbed by government. This cost, one might expect, would be offset by savings in court time produced by timely notifications to the media of applications.

[217] From the user perspective, the Provincial Court model does not appear to be onerous. The filing and submission requirements are straightforward, and should not unduly tax the resources of most counsel. If the server goes down, notification would be problematic. But in such a situation, counsel could apply for advice and directions. Some counsel may not have access to computers. Presumably, they could obtain access to a computer at the Court House. Perhaps the Law Society could install one workstation in each Court House. It could be located in a Barrister's Lounge or in another Court House area.

ISSUE No. 13
In an electronic notification regime, should the media be notified directly or notified through counsel?

[218] Under the PCNTP approach, the media register for notification, but notification is made through counsel.

[219] The advantages of notifying counsel first are that "interim non-disclosure" (Issue 9 *supra*) is likely to be respected, and counsel can provide the appropriate undertakings; counsel can ensure that media outlets are notified (and these outlets may not have registered for notification); and by keeping counsel involved early in the process, media involvement in applications is expedited.

[220] The disadvantages of notifying counsel first are that the media must bear the cost of lawyer involvement, even in cases that would not warrant opposition to an application; delay is caused, since the message must be relayed to the clients; notification may not occur, if (e.g.) counsel is on holidays and does not set up an alternative notification system. Direct media notification could be argued not to pose risks: The same information that is posted in hard-copy would be made available to the media – and disclosure through electronic means should not exceed the hard-copy disclosure. If some information were highly sensitive, applicant counsel could apply for advice and directions and for an interim non-disclosure order. Moreover, the media have Codes of Ethics and the media usually abide by those Codes. This would ensure that the media did not publish what should not be published.

Criminal Rules Working Committee Proposal

[221] The more conservative approach would be to notify counsel first. This could occasion delay and cost, but it would allow for the tightest control of information.

[222] If, however, new rules expressly prohibited disclosure pending the application or if an interim non-disclosure order were in place, the media were expressly notified of the obligation not to disclose information prior to the application, and a contempt warning accompanied the notification, the media could be expected to respect the non-disclosure obligations. Furthermore, the usual rule is that persons are served directly, at least until counsel expressly acknowledge that they will accept service. In any event, a media organization should have the option in an electronic notification system to have the notification provided to counsel.

[223] The Committee therefore proposes that media organizations be entitled to be notified directly, if they so choose; but that they have the option of using counsel as contacts for notification.

ISSUE No. 14
Should new rules provide that once a non-disclosure order is granted, notice of the order should be entered on the court file?

[224] Notification is currently required by the Notice to the Profession of November 4, 2001. Notification does not concern the application procedure itself, but ensures that the terms of an order, once granted, are manifest to anyone reviewing the court file.

CRIMINAL RULES WORKING COMMITTEE PROPOSAL

[225] The Committee proposes that a notification provision be included in a new rule. Notification is linked to the application procedure. Even if the media (or some media outlets) do receive notice of an application, particular media outlets may not (for a variety of reasons) have actual notice of an order eventually granted. The existence of a notification on the file will make it easy for the media to confirm whether or not a non-disclosure order is in place. Notification promotes the worthwhile objective of the Notice to the Profession ("to ensure compliance by the media with Publication Bans and other orders"). The notice would be simple to fill out and file.

[226] Three related issues emerge, which the Committee has not pursued:

(a) whether rules should provide that all non-disclosure orders must be reduced to writing;[118]

(b) whether rules should provide that all published reasons for judgment should contain a notification of any relevant non-disclosure orders

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[118] "Not infrequently, courts have pronounced Publication Bans in the course of proceedings and there is no written record of the Publication Ban, other than on any transcript that might ultimately be prepared. Media may not become aware of the Publication Ban, or there may be some doubt as to whether a Publication Ban was issued or not;" and "media [may be] unable to ascertain the scope of the Publication Ban when they are preparing their stories for publication:" Ad IDEM (Advocates in Defence of Expression in the Media), "Publication Ban Procedure" (April 18, 2001), online: <http://www.adidem.org/position/pubbanpaper180401.html>.

respecting the case[119] (this would confirm the usual Alberta practice; and it should be noted that the *Canadian Guide to the Uniform Preparation of Judgments* does contain rules respecting the posting of appropriate warnings on judgments[120]); and

(c) whether an electronic or hard-copy "registry" of granted non-disclosure orders should be created which would be accessible to the media[121] (one might observe that the need for such a "registry" would likely be obviated by the standardization of the type of notice and notification procedures contemplated in this memorandum and in current Provincial Court and Queen's Bench practice notes).

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[119] "An inconsistency by courts across the country is highlighting publication bans or privacy issues is said to be hampering attempts by the Canadian Legal Information Institute (CanLII) to make rulings available on its website in a timely fashion . . . . [I]deally, there would be a common document used across Canada by judges at every level of court that would be used to identify publication and privacy issues in a ruling:" Shannon Kari, "Publication Bans, Privacy Issues Slowing Flow of CanLII Case Law" (May 14, 2004) 24:2 The Lawyers Weekly 1, 8.

[120] Canadian Citation Committee, *Canadian Guide to the Uniform Preparation of Judgments*, online: <http://www.lexum.umontreal.ca/ccc-ccr/guide/guide.prep_en.html> at paras. 76, 77.

[121] See Elizabeth Raymer, "Ontario media seeking publication ban registry" (May 29, 1998) 18:4 The Lawyers Weekly 8.

CHAPTER 6. DISCUSSION OF ISSUES: COURT OF APPEAL

[227] This chapter concerns non-publication order applications in the Court of Appeal. After (A) briefly describing the status of non-publication orders that have been appealed, the chapter discusses (B) the jurisdiction of the Court of Appeal to grant non-disclosure orders, (C) current appellate procedures for non-disclosure order applications, and (D) outstanding issues and the Committee's proposals respecting those issues.

A. Non-disclosure Orders Made at Trial and Appeals

[228] A non-disclosure order made by a trial judge continues, according to its terms, even though an appeal has been initiated. An appeal does not effect a "stay" of a non-disclosure order. The order may be set aside or varied by an appellate court if the trial judge acted outside the scope of his or her constitutionally limited discretion and misapplied the *Dagenais/Mentuck* tests.[122] The trial judge's "order is binding and conclusive until set aside on appeal."[123]

B. Jurisdiction of the Court of Appeal to Grant Non-disclosure Orders

[229] The Court of Appeal is entitled to grant non-disclosure orders in criminal matters.[124]

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[122] In *Dagenais*, *supra* note 15 at para. 100, the trial judge's publication ban was held to be issued in error, and was therefore set aside; in *R. v. O.N.E.*, [2001] 3 S.C.R. 478 at para. 15, Iacobucci J., a publication ban was varied. According to Sopinka J., a trial judge may vary or revoke his or her order "if the circumstances that were present at the time the order was made have materially changed. In order to be material, the change must relate to a matter that justified the making of the order in the first place:" *R. v. Adams*, [1995] 4 S.C.R. 707 at para. 30; see also *B.G. v. British Columbia*, 2004 BCCA 345 at paras. 19, 22 (C.A.), Finch C.J.

[123] *R. v. Litchfield*, [1993] 4 S.C.R. 333 at para. 14, Iacobucci J.; and see the following: "In the Manitoba Court of Appeal, Monnin J.A. said . . . : 'The Record of a superior Court is to be treated as absolute verity so long as it stands unreversed.' I agree with that statement. It has long been a fundamental rule that a court order made by a court having jurisdiction to make it stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed:" *Wilson v. The Queen*, [1983] 2 S.C.R. 594 at 599, McIntyre J.

[124] See, for example, *R. v. Tremblay*, [2004] A.J. No. 323 (C.A.) [*Tremblay No. 1*]; R. v. Dean, [1997] B.C.J. No. 2996 (C.A.) [imposing a sealing order on a factum respecting fresh evidence and materials filed in support]; *Re Regina and Lortie* (1985), 21 C.C.C. (3d) 436 at 445 (Que. C.A.), L'Heureux-Dubé J.A., as she then was (dissenting, but not on this point).

[230] Subsection 683(3) of the *Criminal Code* provides (concerning appeals of indictable offences) that

> A court of appeal may exercise, in relation to proceedings in the court, any powers not mentioned in subsection (1) [which does not refer to non-disclosure orders] that may be exercised by the court on appeals in civil matters....

[231] Subsection 686(8) authorizes a court of appeal, when exercising any of the powers conferred by ss. 686(2), (4), (6), or (7), to "make any order, in addition, that justice requires." The *Criminal Code* poses no obstacle to granting such orders.

[232] The Court of Appeal is a "superior court of civil and criminal jurisdiction;"[125] it has "all the jurisdiction and powers possessed by the Supreme Court of the North-West Territories en banc immediately before [the Court of Appeal's] organization," including the power to hear and determine "all questions . . . in criminal cases," and "all other petitions, motions, matters or things whatsoever that might be brought in England before a Divisional Court of the High Court of Justice or before the Court of Appeal."[126] Moreover, judges of the Court of Appeal have "all the powers . . . of a judge of a superior court of record."[127] Pursuant to Rule 518(3) of the Alberta Rules of Court (relevant through s. 683(3) of the *Criminal Code*), judges of the Court of Appeal may "give any judgment and make any order which ought to have been made and make such further or other order as the case may require."

[233] Hence, Court of Appeal judges, like trial-level judges, have the discretion to grant non-disclosure orders, as a matter of their inherent jurisdiction. That discretion, then, must be governed by the *Dagenais/Mentuck* criteria.[128]

[234] The Court of Appeal is not likely to be called on often to grant non-disclosure orders. Ordinarily, issues concerning publicity would be worked out prior to trial. Were they not, an after-the-trial non-disclosure order might have little practical value

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[125] *Court of Appeal Act*, R.S.A. 2000, c. C-30, s. 2(1).

[126] *Judicature Act*, R.S.A. 2000, c. J-2, ss. 3(a), 3(b)(iii), 3(b)(v).

[127] *Ibid.*, s. 4; see also s. 5.

[128] *R. v. Tremblay*, [2004] A.J. No. 660 at para. 2 (C.A.), Berger J.A.; *R. v. Budai* (2000), 144 C.C.C. (3d) 1 at paras. 26-28 (B.C.C.A.), Donald J.A.; *R. v. Sharpe* (1999), 181 D.L.R. (4th) 246 (B.C.C.A.), Finch J.A. at paras. 26 - 28

(the information would already have been available to the public). If, however, the Court of Appeal is called on to grant non-disclosure orders, what procedure should be followed and how should that procedure be established?

C. Current Appellate Procedures[129]

[235] The current Rules of Court and Court of Appeal Consolidated Practice Directions do not establish a procedure for applications for non-disclosure orders.[130]

[236] In *Tremblay No. 1*, the accused applied to the Court of Appeal for a publication ban. The Court granted an adjournment, and imposed the following terms and conditions:

(1) The appellant will file with the court and serve upon the Crown all further affidavits in support of the motion within 30 days from today.

(2) The Registrar shall forthwith post outside the Registry Office at 2600 TransCanada Pipelines Tower, a copy of the motion for the publication ban now before the court and any subsequent amendments to that motion upon receipt.

(3) The Registrar, upon request, will make available to any media outlet material filed in support of the application.

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[129] The British Columbia Court of Appeal Criminal Practice Directives establish procedures for access to criminal appeal files:

> Criminal appeal files shall be open to inspection only by the parties to the appeal and their respective counsel, with the following exception.
>
> Members of the public (which includes the media) may have access to the Notice of Appeal or Notice of Application for Leave to Appeal, reasons for judgment and any order on the appeal file. Registry staff are not responsible for determining whether other documents or evidence should be disclosed. If access is sought to any other documents or evidence in a criminal appeal file, the registry should refer that request to the Chief Justice or, at his direction, a judge of the Court. The judge may require the parties to provide their positions on the request.

The governing legal principle is that there is a presumption in favour of public access but that access must be supervised by the Court to ensure that no abuse or harm occurs to any person:" Access to Criminal Appeal Files, online: <http://www.courts.gov.bc.ca/ca/criminal%20practice%20directives/>.

[130] Form L applicable to criminal sentence appeals requires disclosure of ban on publication status; see online: <http://www.albertacourts.ab.ca/ca/practicenotes/formlpdf>; see also Court of Appeal Consolidated Practice Directions, Part I (Sentence Appeals), item 4(h)(ii)(5) (Appeal Book Digest must contain Court Ordered Restrictions on Publication Form, if any), online: <http://www.albertacourts.ab.ca/ca/practicenotes/i.htm#4>; item 13 in Form N, the Civil Noticeof Appeal requires disclosure of publication bans and other non-disclosure orders - online: <http://www.albertacourts.ab.ca/ca/practicenotes/formn-interactive.pdf>.

(4) The Crown and any media outlet wishing to make representations with respect to the motion for the publication ban shall file their representations within 45 days of today's date.

(5) This panel declares that it is seized with these appeals and further directions may be made by any single member of the panel.

(6) The Registrar shall also post a copy of this order so that the media and all parties are aware of the time-frames within which they must operate.[131]

[237] Submissions were entertained for an interim publication ban, although this ban was not granted.

D. Issues

ISSUE No. 15
Should new rules be developed for applications for non-disclosure orders in the Court of Appeal?

[238] Because of the rarity of applications for non-disclosure orders at the Court of Appeal level, one might argue that no rules are needed. Circumstances may be dealt with as they arise. If rules are established for the Court of Queen's Bench, those rules may be referred to, adopted, or adapted by the Court of Appeal as is necessary in particular cases (as appears to have occurred in *Tremblay No. 1*). Resolutions of procedural issues would not begin from nothing – the Court of Appeal would have the benefit of the Queen's Bench rules. Furthermore, if Court of Appeal rules were created, they could encourage the bringing of non-disclosure order applications, creating a demand that would not have existed without these rules.

CRIMINAL RULES WORKING COMMITTEE PROPOSAL

[239] Despite the arguments against the development of any rules for the Court of Appeal respecting non-disclosure applications, in the Committee's view, some standardized direction is better than none at all. Rules – which, as will be seen, may be very simple – would provide useful guidance both to the Court of Appeal and to the bar, should the need for applications for non-disclosure orders arise.

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[131] *Tremblay No. 1*, *supra* note 124 at para. 10.

ISSUE No. 16

If new rules should be developed for applications for non-disclosure orders in the Court of Appeal, should those rules provide a relatively detailed procedural framework, parallel to the Court of Queen's Bench rules?

[240] On the level of principle, the procedures governing applications for non-disclosure orders before the Court of Queen's Bench and the Court of Appeal should have significant similarities.

[241] That similarity could be ensured in two different ways. First, detailed special rules for the Court of Appeal could be developed, with an eye to the rules of court developed for the Court of Queen's Bench. Second, the Court of Appeal Rules could simply provide that in the case of applications for non-disclosure orders, the Court of Appeal shall follow the procedures established in the rules of court, with the necessary changes.

CRIMINAL RULES WORKING COMMITTEE PROPOSAL

[242] In the Committee's opinion, the second option – a rule providing that the Court of Appeal shall follow the procedures established in the rules of court, with the necessary changes – is the preferable option. It has the virtue of simplicity and avoids unnecessary duplication, but gives the Court of Appeal sufficient latitude to customize its own procedures, in relation to the (expected) few non-disclosure order applications that will come before it.

[243] The Committee notes that if the Court of Appeal follows rules of court procedures, it should ensure that the media receive appropriate electronic notification. Some practical difficulties may have to be contended with. Because of the rarity of non-disclosure order applications, the Court of Appeal is unlikely to dedicate a special part of its website to these applications, as has (e.g.) the Provincial Court. On the other hand, it would not make sense to compel counsel to develop an *ad hoc* mechanism for electronic notification (e.g. "counsel are required to send an electronic copy of the motion to the e-mail addresses of local media lawyers and to e-mail addresses for media outlets found on Internet websites"). Since, at this point, we are not aware of the nature of the electronic notice system proposed for the Court of Queen's Bench, we cannot say whether it would be feasible for this system to be used for Court of Appeal applications. "Piggy-backing" on this system, however, would be convenient.

Media outlets or their counsel or both would be registered with the system; there would be a means of posting standard-form information to the system; the nature of the standard-form information would be settled; and there would be a means for automatically broadcasting the information to recipients. Any electronic notification would have to be sufficiently customizable so that recipients would be alerted to the proper court hearing the application, and to the time limitations applicable to Court of Appeal applications. If "piggybacking" is not feasible, and if the Court of Appeal does not develop its own system of electronic notification, then the obligation to inform the media will have to be fulfilled through the conscientiousness and ingenuity of counsel and judges.

[244] One matter which may warrant special mention in any Court of Appeal rules concerns the nature of the "tribunal" that would hear the application. *The Tremblay No. 1* panel took carriage of the publication ban application. There may be cases, however, in which it may make sense for a single judge of the Court of Appeal to hear an application. The procedures for designating judges to hear non-disclosure applications may be established in general Court of Appeal rules. If not, some mechanism should be established in connection with the non-disclosure application rules to permit a single judge to hear an application.

SCHEDULE A*

Practice Note:

Provincial Court of Alberta

Notice to the Profession

Publication Bans

Until further notice, this Practice Note is in force and applies to proceedings conducted in the

1. Criminal Division of The Provincial Court of Alberta, in Edmonton only.

2. This Practice Note applies to members of the Law Society of Alberta who intend to apply for a court Order which restricts public access to, or the media's ability to fully report on, court documents or proceedings (made pursuant to a judge's common law or legislated discretionary authority) and includes without limitation restrictions on publication or rights of access, such as:

   a. Publication bans under s.486 of the Criminal Code;

   b. Orders which partially, or completely, seal evidence taken in such proceedings, excepting, those matters which pertain to the signing of general search warrants, special warrants, assistance Orders and matters related thereto;

   c. Use of pseudonyms;

   d. *In* Camera Orders;

   e. Orders restricting access to and copying of exhibits; and

   f. Orders permitting witnesses or participants in judicial proceedings to testify in a manner that would prevent their identification, under s.486 of the Criminal Code.

3. This Practice Note does not apply to any mandatory statutory publication bans or mandatory Orders, (including without limitation those authorized pursuant to the Criminal Code).

4. "Interested Parties" includes the parties to the proceedings. Any electronic or print media representative who wishes to receive notice pursuant to this Practice Note may register as an "interested party." In order for an electronic or print media representative to register:

   a. such media representative must name a member of the Law Society of Alberta to receive notice on behalf of the media representative; and

   b. provide and maintain a current email address for such member of the Law Society of Alberta, which email address shall be utilized in providing notice as provided for in paragraphs 8 & 9 herein.

5. On application to the Court, any other person may be named an interested party.

6. Except with leave of the Court, counsel, on behalf of an accused, a witness or a justice system participant (as referred to in s.486 of the Criminal Code) **must** file a written copy of the Notice of the Application and provide the notice required pursuant to paragraphs 8 & 9 hereof at least two clear days before the beginning of the trial, application or proceeding or matter to which the ban or Order is to apply. In appropriate circumstances, the Court may direct that notice of any Application be given to such additional parties as the Court deems necessary.

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In completing the Notice of Application required pursuant to paragraphs 8 & 9 hereof, any party applying must provide a description sufficient to provide recipients of the notice with an understanding of the nature of the intended application.

7. The application must be made to the judge assigned to hear the case. If that judge is unknown or unavailable, the application must be made to the case management judge. If there is no case management judge, the application must be made before the Chief Judge, the Assistant Chief Judge, or their designate.

8. Unless otherwise ordered, the application must be on notice to Interested Parties, including any electronic or print media representative who has registered as an "interested party" in accordance with this Practice Note. The Applicant may apply to the Court for further directions as to the parties to be served and the manner of service.

9. Unless otherwise ordered by the Court, notice to the electronic or print media who are registered as an "interested party" must be given by completing and submitting the notice prescribed in Form "A" on:

   a. the Alberta Courts web site (www.albertacourts.ab.ca) at the Provincial Court-Criminal site, under Criminal Code forms, "Practice Note governing Notice of Application for Publication Ban." If such web site is not accessible, notice must be given by email or fax to media who have provided a fax number or an email address to the Clerk of the Court for the purpose of receiving such notice, **and**

   b. at the place reserved for posting notice at the Law Courts Building, Edmonton, Alberta.

10. Access to the above website will be "by protected password only," and such password(s) as may be required will be provided to members of the Law Society of Alberta in the manner directed by the Chief Judge or their designate.

11. Any person or entity who is not a party to the proceedings, and who claims an interest in the proceedings must apply to the Court for standing to be heard at the application.

Sealing / Unsealing Court Files

12. An application to seal the entire court file, or an application to set aside a sealing order, must be made to the Chief Judge, the Assistant Chief Judge, or their respective designate, who may make such directions as to the parties to be served, the time for and the manner of service of notice which, in their discretion, they determine to be appropriate.

DATED this _____ day of March 2004.

The Honourable E.J.M. Walter
Chief Judge of the Provincial Court of Alberta

Alberta Courts

Provincial Court
- Civil Court
- Criminal Court
  - Common Questions
  - Judicial Assignments
  - Publication Bans
- Family Court
- Traffic Court
- Youth Court
- Judgments
- News & Notices
- Publications

NOTICE OF APPLICATIONS FOR PUBLICATION BANS

This system has been put in place by the Provincial Court of Alberta in order to provide a means of giving notice of any application for a publication ban or an Order which would restrict the ability of the media to report on court proceedings.

At present, this form is for use by lawyers only. By submitting the form on the next page, the user sends an e-mail message to news media editors (or their legal counsel) who subscribe to this service. The e-mail message will advise the editor of any proposed application for a discretionary publication ban or Order restricting full reporting of court proceedings.

If you are a news outlet that wishes to receive electronic notice of any court applications that will be made for any discretionary publication bans, please register to receive notice by submitting a valid e-mail address for your office or legal counsel:

Your Email: [ ] Submit

○ subscribe ○ unsubscribe

Please note the following:

A. At present this remains a pilot project and is **for use in the Criminal Division of the Provincial Court in Edmonton only.**
B. This form does not constitute or substitute for the application for any publication ban; it is simply the **NOTICE THAT SUCH AN APPLICATION WILL BE MADE.**
C. Please read the Practice Note Governing Notice of Application for Publication Ban issued by the Chief Judge of the Provincial Court relative to mandatory use of this form, and, notice requirements (either by use of this electronic form, or, by email or fax). If notice is required for other parties, then that notice must also be given.
D. Filing of this **NOTICE** does not mean any publication ban or Order will be granted; the application must be heard in court.
E. If you have any questions, please contact Neil.Skinner@gov.ab.ca or phone 780/427-0459.

To continue, enter your PIN number provided by the Courts. If you do not have a PIN, please contact brenda.haynes@gov.ab.ca; provide your name and telephone number within your request.

PIN: [ ] Continue

Important Legal Notice: The information on this site is subject to a Disclaimer. Website comments?

Provincial Court
- Civil Court
- Criminal Court
  - Common Questions
  - Judicial Assignments
  - Publication Bans
- Family Court
- Traffic Court
- Youth Court
- Judgments
- News & Notices
- Publications

NOTICE OF APPLICATIONS FOR PUBLICATION BANS

THE PROVINCIAL COURT OF ALBERTA
CRIMINAL DIVISION (EDMONTON **)**

BETWEEN:

HER MAJESTY THE QUEEN
and

[Name of Accused Person(s)]

[Court Docket No.]

[Currently scheduled Courtroom, date & time]

NOTICE OF APPLICATION FOR A ORDER RESTRICTING or BANNING PUBLICATION OF COURT PROCEEDINGS

TAKE NOTICE THAT an application will be made by, or on behalf of:

- ○ the Crown Prosecutor
- ○ an accused
- ○ a complainant
- ○ a justice system participant involved in proceedings referred to in s.486(4.1)
- ○ a witness
- ○ other (please specify below)

to the Judge presiding in The Provincial Court of Alberta, in Edmonton, Alberta

on the _____ day of _____, _____ at 9:00am

or so soon thereafter as the application can be heard, for an Order banning the publication of:

Examples:
-an Order under s.486(3) of the **Criminal Code** banning the publication of identity (or any information which would reveal identity)
-a publication ban on some or all of the evidence heard by the Judge
-an Order directing that the courtroom be closed for a private hearing
-an Order permitting a witness to testify under a fictitious name

DATED this _____ day of _____, _____

Sender's email address: _____

Sender's mailing address: _____

Opposing Counsel/Co-counsel's email address for service (if known): _____

NOTICE: If you are unable to effect service of this Notice on opposing/co-counsel by email, you must effect personal service on his/her office, or by fax, and provide proof thereof.

Submit

Important Legal Notice: The information on this site is subject to a Disclaimer. Website comments?

SCHEDULE B*

COURT OF QUEEN'S BENCH OF ALBERTA

CIVIL PRACTICE NOTE NO. 12

ORDERS RESTRICTING MEDIA REPORTING OR PUBLIC ACCESS

EFFECTIVE SEPTEMBER 1, 2004

1. Unless otherwise provided for in another practice note, this practice note applies to an application for:

   a) the use of pseudonyms,
   b) a publication ban,
   c) a partial sealing order,
   d) an order permitting participants in judicial proceedings to testify behind a screen or in some other fashion to prevent their identification, and
   e) an order for an *in camera* hearing,

   under a judge's discretionary legislated or common law authority.

2. "Interested parties" include the parties to the lawsuit, the electronic and print media, and any other person named by the Court.

3. a. The Applicant must file with the Clerk of the Court three copies of the Notice of Application, as prescribed in Form A, and, except with leave of the Court, serve the interested parties, except the media, at least 2 clear days before the beginning of the trial, application, proceeding, or matter to which the ban or order is to apply.

   b. Unless otherwise ordered, and pending the implementation of an electronic form of notice, notice to the media is given by filing Form A with the Clerk of the Court, who will post the notice at the place reserved for such notice at the courthouse where the application is to be heard.

4. The application must be made to the judge assigned to hear the case. If that judge is unknown or unavailable, the application must be made to the case management judge. If there is no case management judge, the application must be made to the Chief Justice, the Associate Chief Justice, or a judge they have authorized to hear such applications.

5. The Applicant may apply to the Court for further directions as to the parties to be served and the manner of service.

6. Any party not referred to in para. 2 above and claiming an interest in the proceedings must apply to the Court for standing to be heard at the application.

7. The information that is the subject of the initial application may not be published

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without leave of the Court until that application is heard.

8. If satisfied that there has been a failure to comply with the requirements of this practice note, the Court, on application or on its motion, may:

a) make any of the orders provided in Rule 599.1 or 704(1)(d);
b) require the party or counsel representing the party, or both, to pay the reasonable expenses incurred because of any noncompliance with this practice note, including counsel's fees; or
c) make any other appropriate order.

Sealing / Unsealing Court Files

An application to seal the entire court file, or an application to set aside a sealing order, must be made to the Chief Justice, the Associate Chief Justice, or a judge they have authorized to hear such applications, who will give directions regarding notice and service.

Dated this 15th day of July, 2004

Allan H. J. Wachowich
Chief Justice

Allen B. Sulatycky
Associate Chief Justice

PRACTICE NOTE #12
FORM A

File # _____

IN THE COURT OF QUEEN'S BENCH
JUDICIAL DISTRICT OF _____

BETWEEN:[1]

X

(Plaintiff/Applicant/Appellant)

-and-

Y

(Defendant/Respondent)

Notice of Application for an Order Restricting Media Reporting or Public Access

Take notice that an application for a **(specify the order sought, for example:** *publication ban, a partial sealing or unsealing order, the use of pseudonyms, an order permitting participants in judicial proceedings to testify behind a screen, an order for an in camera hearing) will* be made before the (Chief Justice, Associate Chief Justice, or _____) at _____ , Alberta on the ____ day of _____ , 20 ___ at _____ a.m./p.m. on behalf of **(name of applicant)** who is **(describe applicant:** *Crown, plaintiff, witness etc.)*

And further take notice that the specific terms of the proposed order sought are **(describe the nature of the order:** *all of proceedings closed, specific evidence sealed, etc.),* and the proposed duration of the order is _____ .

And further take notice that the specific grounds for the application are **(describe legal basis for application, for example:** *the commercial interests at stake relate to the important objective of preserving contractual obligations of confidentiality);*

---

1 **Parties** (if the ban or sealing order relates to the identity of a party, that party may be temporarily identified by initials pending the hearing of the application).

And further take notice that on the application reference will be had to Queen's Bench Practice Note # 9 and **(describe evidence to be relied on:** *affidavit, viva voce or other* **and any statutory provision or rule).**

_____ day of _____ , 20 ___.

Dated this

_____

Counsel for the Applicant

_____

_____

Address and phone number of
Applicant or Applicant's counsel.

Note: The information that is the subject of this application may not be published without leave of the court until the application is heard.